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Supreme Court, U.S.
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CASE NUMBER ______________________________

In the Supreme Court of the United States

AARON S. BURNS

v.

JAMES MCFADDEN, Warden; ARIZONA
ATTORNEY GENERAL

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Prosecutor's significant promise, that the Petitioner would receive a substantial benefit, including possible immunity, if the state decided to use his testimony, must be enforced when the Petitioner is subsequently disclosed as a witness.

2. Whether the Petitioner suffered a serious Due Process violation when Petitioner was denied the benefit of the plea agreement which the Defendant reasonably expected he would receive for giving a "free-talk" to the Prosecutor.

3. Whether the United States District Court for the District of Arizona erred in its finding that Petitioner has failed to exhaust State remedies.

4. Even if the Petitioner did fail to exhaust State remedies, there was cause for that failure, and he suffered severe prejudice as a result.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v
- Cases v
- Constitution and Statutes vii

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

STAGE AT WHICH THE FEDERAL QUESTIONS WERE RAISED 10

REASONS FOR GRANTING REVIEW 11
- Due Process Requires That Promises Made By the State Must be Enforced. 12
- The District Court Erred in Deciding that the Petitioner Failed to Exhaust State Remedies 15

CONCLUSION 19

APPENDIX A 1a

APPENDIX B 2a

APPENDIX C 5a
APPENDIX D 7a
APPENDIX E 8a
APPENDIX F 9a
APPENDIX G 15a
APPENDIX H 37a
APPENDIX I 39a
APPENDIX J 41a
APPENDIX K 45a
APPENDIX L 47a
APPENDIX M 63a
APPENDIX N 66a
APPENDIX O 69a
APPENDIX P 71a
APPENDIX Q 104a
APPENDIX R 113a
APPENDIX S 119a

APPENDIX T 129a

APPENDIX U 131a

APPENDIX V 138a

TABLE OF AUTHORITIES

Cases

Bartone v. United States,
375 U.S. 52, 84 S.Ct. 21, 11 L.Ed.2d 11 (1963)
. . . . 19

Boykin v. Alabama,
395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274
(1969) 12

Harmon v. Ryan,
959 F.2d 1457 (9th Cir. 1992) 19

Hovey v. Superior Court In and For the County of Maricopa,
165 Ariz. 27 8, 798 P.2d 416, 420 (Ariz. App. 1990)
. . . . 12

Mejia v. Irwin,
195 Ariz. 270, 987 P.2d 756 (App. 1999) 12

Murray v. Carrier,
477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397
(1982). 10

Rivera-Sanchez v. Crist,
832 F. Supp. 276, 280 (Ariz. 1993) 16, 17

Roettgen v. Copeland,
33 F.3d 36 (9th Cir. 1994) 16

Santobello v. New York,
404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)
. . . . 9, 12, 14

State v. Georgeoff,
163 Ariz. 242, 787 P.2d 141 (App. 1989) 15

State v. Platt,
162 Ariz. 414, 783 P.2d 1206, (App.1989) 15

State v. Romero,
145 Ariz. 485, 702 P.2d 714 (App. 1985) 12

State v. Ross,
166 Ariz. 579, 804 P.2d 112 (App. 1990) 14

Swoopes v. Sublett,
196 F. 3d 1008, 1009-10 (9th Cir. 1999) 15

Thomas v. Lewis,
945 F.2d 1119 (9th Cir. 1991) 9, 17

United States v. Lewis,
979 F.2d 1372 (9th Cir. 1992) 12

United States v. Packwood,
687 F. Supp. 471 (N.D. Cal. 1987) 12, 13

United States v. Salerno,
481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697
(1987) 12

Wainwright v. Sykes,
433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)
. . . . 9, 17

Constitution and Statutes

28 U.S.C. §1254(1) 2

Article III, Section 2 of the United States Constitution 2

Fourteenth Amendment, section one 2

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ON PETITION FOR A WRIT OF
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PETITION FOR WRIT OF CERTIORARI

Vernon E. Peltz, on behalf of Aaron S. Burns, respectfully petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case which affirmed the decision of the United States District Court for the District of Arizona denying the 28 U.S.C. §2254 habeas corpus petition challenging Aaron S. Burns' guilty plea conviction and sentence for one count of drive-by shooting.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished and is contained in Appendix B, page 2a.

JURISDICTION

January 28, 2002 is the date of the entry of judgment sought to be reviewed in this case. On June 21, 2002 the United States Court of Appeals for the Ninth Circuit denied Petitioner's petition for rehearing of the January 28, 2002 decision of the United States Court of Appeals for the Ninth Circuit. (Appendix A, page 1a). There are no orders respecting a rehearing nor any orders granting an extension of time to file the petition for a writ of certiorari. This court has original jurisdiction of this matter pursuant to Article III, Section 2 of the United States Constitution. The statutory provision believed to confer jurisdiction on this Court to review the final judgment of the Ninth Circuit Court of Appeals by writ of certiorari is 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, section one:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Aaron S. Burns, while under a felony indictment, learned of a conspiracy to commit murder. That homicide eventually occurred. Realizing the information he possessed would be useful to the State, Mr. Burns offered the prosecutor a "free-talk" regarding the information he possessed. (Appendix V, page 138a). Petitioner was assured by his attorney that if his information proved useful the prosecutor would dismiss the charges against him in exchange for his information. (Appendix P, page 82a). The free-talk agreement was approved by the County Attorney's Office.

Due to some mis-communications among the several Deputy County Attorney's who were involved, a separate plea agreement was negotiated with Petitioner before the State completed its evaluation of the free-talk. The Petitioner was informed that the State was not going to use his information, therefore the second agreement, signed on May 4, 1999, granted no consideration to Mr. Burns for the free-talk information. (Appendix U, page 131a). After Petitioner entered into the second plea agreement he was sentenced to a seven year minimum sentence. Petitioner had agreed to accept the second plea agreement only if his fellow inmates would never learn that he had ever cooperated with the State by giving a free-talk for the State.

Mr. Burns began serving his sentence in the Yuma Prison, Dakota Unit. Quite some time after he was already serving his sentence, the County Attorney's Office finally completed its evaluation of Mr. Burns' information. The State then determined that it would use Mr. Burns' free-talk and Mr. Burns was disclosed as a witness in the murder investigation. The State then prepared a summary of Mr. Burns' free-talk and provided that transcript to the three murder defendants. By revealing Mr. Burns' identity and the detailed substance of the free talk the State foreclosed many defenses which the three murder conspirators might have offered. Additionally, once Mr. Burns was disclosed, the State would very likely obtain guilty pleas from those who knew an informant would testify against them.

When the State disclosed Mr. Burns as an informant and used his free-talk against the murder Defendants, the State received the full benefit of its bargain with Mr. Burns, and Mr. Burns experienced the full damage of the State's use of his information which he had offered in exchange for his freedom. The State, however, never complied with its duty of reciprocal performance. Mr. Burns never received any consideration for informing against the murder conspirators .

These facts were conceded by the State and acknowledged by the trial court in the following excerpt,

> THE COURT: Certainly. All right. If I understand the scenario here, there has been three prosecutors. The first one says, I am not going to use him.

The second one puts him on the witness list -

MR. PERRY: and discloses his statement.

THE COURT: and discloses the statements to the defendants in the murder case. Then you are the third prosecutor?

MR. PERRY: Yes, sir.

THE COURT: And you determined you don't want to use him as a witness?

MR. PERRY: Correct. Now, I have done something that I eluded to in my response, and that is that I have made contact with the Department of Corrections to get him housed in a way so he won't be continuously locked down and will be as protected as he can be. That hasn't reached fruition yet.

But I think I will be able to be successful in getting him somewhere where he won't have to be locked down for the rest of his sentence, and he, you know, will be protected at least to the degree that they can protect him.

As you know, Your Honor, it is never 100 percent, and I will tell you that he was also listed in the DR's for something that he reported on this defendant -- on the defendant, who is really the one in question, who is Mr. Givens. That was entirely separate and apart from the free talk, but as -- not as

> to the murder. It was as to a different case.

(Appendix Q, page 107a-108a).

The trial court even acknowledged the inherent unfairness, but he did not know how tp provide a remedy.

> All right. That is – that is the part that seems to be rather unfair so far as the defendant is concerned. They did in fact use the information that he provided. And if this, Mr. Carrasco's information is correct, the disclosure of the testimony foreclosed defenses which the murder conspirators might have offered. So there appears to be quid pro quo... I don't know what the remedy is.

(Appendix Q, page 109a-110a).

Mr. Burns was severely prejudiced by the State's actions. Indeed, the State actually placed Mr. Burns in a far worse position, since he was not only serving the prison time that he bargained to avoid, but he was revealed as an informant to the numerous hard-core, long-term offenders with whom he was incarcerated. Mr. Burns was suddenly facing imminent severe injury or death from the individuals who believed that Mr. Burns had given a statement against them.

When Mr. Burns' counsel confronted William Perry at the County Prosecutor's office with this inequity, the County Prosecutor reversed its earlier position, suddenly deciding that Mr. Burns' testimony would not be useful after all. (Appendix Q, page107a). The State withdrew Mr. Burns' name from its witness list in the homicide prosecution, as though that action could restore the status quo ante.

On November 10, 1999, Mr. Burns filed a Petition for Post-Conviction Relief seeking specific performance as a remedy for the breach, in the form of dismissal of the charges against him. (Appendix S, page 119). On December 21, 1999, Mr. Burns filed a memorandum in support of that Petition. (Appendix R, page 113a). On January 4, 2000, the trial court did find that the State had breached its agreement to consider immunity if the State intended to use the information obtained from Petitioner.

> THE COURT: Thank you.
>
> The -- it is obvious that the situation that has arisen is unfair to Mr. Burns, however, does unfairness rise to the height of finding a determination that his rights were violated to the extent that I should grant the Petition for Post-Conviction Relief.
>
> The Exhibit 1 specifically reserved to the County Attorney's Office absolute discretion on whether to use his testimony or not.
>
> Can I see it again, please?
>
> THE CLERK: Yes.
>
> THE COURT: The unfairness arises from the fact that he was told through his attorney that he was -- his testimony would not be used and he therefore entered the plea agreement in this cause number, 98-06715.
>
> I am therefore going to summarily dismissyour Petition for Post-Conviction Relief. You have 30 days in which to file

> a Petition for Review. Thank you,
>
> gentlemen.

(Appendix P, page 102). The trial court also conceded that, as a result of the State's breach, Mr. Burns was facing imminent severe injury or death (Appendix P, page 102a). The fact that Mr. Burns was facing imminent danger was never disputed by the State. Despite making the aforesaid determinations, the trial court refused to provide any remedy for the substantial violations of Due Process suffered by Mr. Burns for the State's breach of its agreement with him.

Because the attorney for Petitioner was genuinely concerned for Petitioner's safety he believed that the Petitioner could likely be dead by the time an appeal could be heard. On March 20, 2000, Mr. Burns filed a Petition for Special Action alleging that the trial court erred as a matter of law, on an issue of statewide importance and since the error placed Mr. Burns' life at grave risk he had no equally plain speedy remedy. The Court of Appeals declined jurisdiction on February 24, 2000, (Appendix M, page 63a) and a Petition for Review was filed with the Arizona Supreme Court on March 16, 2000. (Apendix L, page 47a). Mr. Burns also applied to the Arizona Superior Court for leave to file a delayed appeal, through a second Petition for Post-conviction relief filed on March 20, 2000 but that request was denied on April 21, 2000. (Appendix I, page 39a). The Arizona Supreme Court subsequently denied Mr. Burns' Petition for Review on September 6, 2000, (Appendix H, page 37a) and on October 6, 2000, Mr. Burns filed a Petition for Writ of Habeas Corpus in the

United States District Court for the District of Arizona. (Appendix G, page 15a). On June 19, 2001, the District Court denied the Petition, ruling that Mr. Burns had procedurally defaulted on his claim that he was denied due process by the State trial Court, as a result of having failed to exhaust State remedies. (Appendix F, page 9a). The District Court made this finding despite the fact that Mr. Burns demonstrated both cause and prejudice to excuse any failure to exhaust State remedies under *Thomas v. Lewis*, 945 F.2d 1119 (9th Cir. 1991). Mr. Burns filed an appeal in the United States Court of Appeals for the Ninth Circuit on October 1, 2001, (Appendix D, page 7a) and that Court upheld the finding of the District Court on January 28, 2002. (Appendix B, page 2a). The Opinion of the District Court is in conflict with this Court's longstanding view, first enunciated in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2095, 95 L.Ed.2d (1977), that federal habeas corpus review should not be denied when a Petitioner shows cause for a procedural default and a resulting prejudice. The Opinion also conflicts with the line of Supreme Court cases concluding that plea agreements are contractual in nature and that the State must honor such agreements. See *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d (1971). The Opinion also fails to analyze, discuss or appreciate the miscarriage of justice that has resulted from the State of Arizona's breach of its contract with Petitioner. The Supreme Court stressed in *Wainwright* the importance of "adjudicating for the first time the federal constitutional claim of a defendant who, in the absence of such an adjudication will be the victim of a miscarriage of justice." *Wainwright*, U.S. at 91-2, S.Ct. at 2408, L.Ed.2d at 610. This holding has been strongly supported ever since. Indeed, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal court may grant a writ of habeas corpus even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 496 (1982).

STAGE AT WHICH THE FEDERAL QUESTIONS WERE RAISED

The Petitioner first raised the issue that the State had violated his constitutional rights, by breaking the two plea agreements, in the Trial Memorandum filed with the Superior Court on December 21, 1999. Petitioner relied therein on Ninth Circuit authorities, urging the Court to grant Mr. Burns specific performance as a remedy, since Mr. Burns gave his free-talk only after his attorney, Humberto Rosales, advised Mr. Burns that the charges against Petitioner would possibly be dismissed if Mr. Burns provided valuable, verifiable information to the prosecutors. That same Trial Memorandum also relied on Ninth Circuit authorities for the proposition that the Ninth Circuit followed traditional contract principles by using the reasonable expectations of the parties at the time of contracting to determine if a breach had deprived a party of the benefit of his bargain.

At the hearing on January 27, 2000, the Petitioner presented testimony that his attorney on the date of the free-talk, Humberto Rosales, had advised Petitioner that the free-talk could result in the dismissal of all charges against Mr. Burns.

Petitioner also raised his constitutional claim of violation of his right to due process before the Arizona Court of Appeals when he filed a special action.

REASONS FOR GRANTING REVIEW

This Court should grant certiorari because it is a gross miscarriage of justice to permit Arizona to break its promise that the Petitioner would receive a substantial benefit if he agreed to provide a free-talk and cooperate with the State. The State of Arizona did breach that agreement, and that fact has been conceded by the Maricopa County Superior Court.

This Court should also grant the Petitioner a writ of certiorari because the Ninth Circuit failed to adequately consider the extraordinary circumstances which caused Mr. Burns to seek a special action. The Ninth Circuit ignored the fact that the confinement and danger that Petitioner faced were a cause for his procedural default. The Ninth Circuit also ignored the fact that the Petitioner had exhausted his State remedies through subsequent collateral attacks in the form of Petitions for post-conviction relief before he filed the Petition for Writ of Habeas Corpus. The United States District Court for the District of Arizona wrongfully denied Petitioner's Habeas Corpus Petition citing a procedural default, and the Ninth Circuit Court of Appeals wrongfully upheld that decision. The only way that these Courts could reach those decisions was by totally and callously ignoring both the very real danger that the State's breach had caused Petitioner, and the fact that Mr. Burns had demonstrated sufficient cause and prejudice to excuse any procedural default that might exist.

Due Process Requires That Promises Made

By the State Must be Enforced.

The Due Process Clause requires that defendants must be fully informed of the consequences of their pleas. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The apparent terms and conditions of the plea agreement must be fulfilled. *Santobello v. New York*, 404 U.S. 257 (1971). The constitutional right to Due Process of law guarantees that any sanction that deprives a defendant of life, liberty, or property must "be implemented in a fair manner. *United States v. Salerno*, 481 U.S. 739, at 746 (1987).

Both Arizona law and Federal law recognize that a plea agreement is like a contract between the State and the defendant which is subject to contract interpretation. *Mejia v. Irwin*, 195 Ariz. 270, 987 P.2d 756 (App. 1999); and *United States v. Lewis*, 979 F.2d 1372 (9th Cir. 1992) An oral promise is just as binding as if written directly into the plea agreement. *State v. Romero*, 145 Ariz. 485, 702 P.2d 714 (App. 1985).

Specific performance is a contract remedy for breached plea agreements because those agreements are contractual in nature. *United States v. Packwood*, 687 F. Supp. 471 (N.D. Cal. 1987). Specific performance, as an equitable remedy, is available where the remedy at law is inadequate. A contractual remedy is adequate if it places the non-breaching party in as good a legal position as that party would have enjoyed had the contract been performed. *Hovey v. Superior Court In and For the County of Maricopa*, 165 Ariz. 27 8, 798 P.2d 416, 420 (Ariz. App. 1990)

Mr. Burns performed all of the conditions of the initial agreement. The State then received the substance of the reasonably expected benefit of its bargain in that it used Appellant testimony and disclosed him as an informant. The State, however, never fulfilled its obligation of reciprocal performance in that it did not dismiss the charges against Appellant as it was required to do under the initial agreement. Mr. Burns provided the free talk and not only did he not receive any benefit promised, he was placed in a far worse position, since he is now a known informant, and, for his own protection, is serving his seven-year sentence, essentially incarcerated in solitary confinement.

The *Packwood* court discussed the aspect of a material breach of a plea agreement and stated:

> Few courts have discussed what constitutes a "material breach" of a plea agreement. The Ninth Circuit has followed the traditional contract principles in looking toward the reasonable expectations of the parties at the time of contracting to discover whether a given breach has deprived them of the benefit of their bargain.

United Stated v. Packwood, 687 F. Supp 471, at 474-5 (ND Cal. 1987). When the prosecutor declined to use Petitioner's testimony and Petitioner entered into a second agreement, Petitioner reasonably expected that his testimony would be neither be used nor disclosed to the defendants charged with murder. Though the first agreement did not explicitly state that the charges against Petitioner would be dismissed, that was the understanding of both parties to the contract. "A breach of a plea agreement occurs not only when the state directly breaks its promise, but also when the spirit of the inducement, reasonably inferred from the written agreement, is breached." *State v. Ross*, 166 Ariz. 579, at 583, 804 P.2d 112, at 116 (App. 1990). The *Ross* Court also stated that a prosecutor commits reversible error when he violates his plea agreement with the defendant. Breaking a promise which induced the defendant to plead guilty rather than to exercise his right to a jury trial undercuts the essential fairness and integrity of our system of justice and denies that defendant his constitutional right to due process. It is an essential component of fundamental fairness that, when a defendant and the state enter into a particular agreement, the state must comply with its promises. *Santobello*, 404 U.S. at 262. The vast majority of cases are resolved by plea agreements, and if the State is not held to the promises it makes in these agreements, defendants will not be willing to enter into plea bargains. Additionally, informants are used in a large number of cases, and often provide evidence that would not otherwise be available. If the State is permitted to endanger the life of an informant, through an admitted breach of a pre-existing agreement, informants will no longer be willing to cooperate with the State.

It was conceded by the State and accepted by the trial Court that, due to the State's breach, Petitioner's life and safety could not, and still cannot, be effectively protected. Where the State violates a plea agreement and withdrawal from it would be an inadequate remedy, the trial court must specifically enforce the original plea agreement. *Hovey v. Superior Court ex rel. County of Maricopa, supra.* Despite the State's admission that it breached the first agreement with Petitioner, and despite the fact that the trial court recognized this fact, the trial court provided Petitioner no remedy. The State subsequently claimed that they could repair their "error" merely by asserting that they would not require Petitioner to testify at the homicide trial, however, that did nothing to mitigate the State's disclosure and use of Petitioner's testimony. The Petitioner was certainly not placed in as good a legal position as he would have enjoyed had the contract been performed. "To allow the state to change its mind in these circumstances comports neither with ordinary contract principles nor with the more expansive notions of fundamental fairness that control the relations between a state and its citizens." *State v. Platt*, 162 Ariz. 414, at 415, 783 P.2d 1206, at 1207 (App.1989).**** Finally, there is more at risk here than Petitioner's life and safety. As the Court stated in *State v. Georgeoff*, 163 Ariz. 242, at 246, 787 P.2d 141, 145 (App. 1989).

> In the context of a broken plea agreement, there is more at stake than the liberty of the defendant or the length of his term. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice... (citations and quotes omitted).

The District Court Erred in Deciding that the Petitioner Failed to Exhaust State Remedies

The District Court erred as a matter of law when, apparently relying on *Swoopes v. Sublett*, 196 F. 3d 1008, 1009-10 (9th Cir. 1999), it ruled that state remedies can not be exhausted without a Court of Appeals ruling.

Indeed, *Roettgen v. Copeland*, 33 F.3d 36, at 38 (9th Cir. 1994) specifically states that a petitioner may exhaust state court remedies by collaterally attacking his conviction with a petition for post-conviction relief. See also, *Rivera-Sanchez v. Crist*, 832 F. Supp. 276 (Ariz. 1993), holding that;

> There are two ways for a Petitioner to meet the exhaustion requirement: (1) by providing the highest state court with an opportunity to rule on the merits of his claim; or (2) by showing that, at the time the petitioner filed his habeas petition in federal court, no state remedies remained available to him.

Rivera-Sanchez v. Crist, at 280.

Although these facts and authorities were clearly set forth in Mr. Burns' original Brief before the United States Court of Appeals for the Ninth Circuit, the Arizona Attorney General did not present any opposing arguments whatsoever. This is because Mr. Burns did collaterally attack his conviction and those collateral proceedings were sufficient to exhaust his state court remedies. The Arizona Attorney General also failed to dispute that argument, simply because no basis existed to do so. Mr. Burns clearly met Arizona's exhaustion requirements since he filed not only multiple petitions for post-conviction relief, he also pled the merits of his case to both the Arizona Court of Appeals and the Arizona Supreme Court.

The Arizona Attorney General has also not disputed the fact that no state remedies remain available to Mr. Burns, and that alone satisfies the exhaustion requirement, as set forth in *Rivera-Sanchez v. Crist*. While it is true that

Rivera-Sanchez v. Crist acknowledges a procedural default when a petitioner fails to fairly present his claims at the State level, such a default only bars federal habeas corpus review when a Petitioner fails to show cause for the default and a resulting prejudice. In *Wainwright v. Sykes, 433 U.S. 72 (1977)* the United States Supreme Court ruled as follows:

> The 'cause'-and-'prejudice' exception of the *Francis* rule will afford an adequate guarantee... that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who, in the absence of such an adjudication will be the victim of a miscarriage of justice.

Wainwright v. Sykes, 433 U.S. at 90-91.

Even if, Mr. Burns had failed to exhaust state remedies, thereby procedurally defaulting his claim for federal relief, he has demonstrated sufficient cause and prejudice to prevent a procedural default from barring federal relief.

Cause is a legitimate excuse for the default, and prejudice is actual harm resulting from a constitutional violation; *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1991). Reasonable minds cannot differ that Mr. Burns had cause for any procedural default which may have occurred. Any such default would result solely from Petitioner's filing of a Petition for Special Action as opposed to a direct Appeal. As set forth in detail in Mr. Burns's Opening Brief before the United States Court of Appeals for the Ninth Circuit, Mr. Burns filed a Petition for Special Action because he was facing a life threatening emergency. Mr. Burns had been revealed as an informant against murder suspects who were incarcerated in the same prison system as Mr. Burns, and the State conceded that this situation placed both Petitioner's safety and his very life in immediate and imminent danger. It is difficult to imagine a more compelling cause to seek the Special Action relief which Arizona Attorney General contended had caused a procedural default.

Similarly, it is difficult to dispute that Mr. Burns has suffered significant prejudice as a result of this situation. According to both Arizona law and the ruling of the trial court, Mr. Burns should be a free man. Instead, he is serving a seven year sentence, not just as a prisoner, but as a known informant. Consequently, Mr. Burns is forced to serve a punishment even harsher than the one he had been sentenced to serve, and that injury increases with each passing day.

As discussed in Mr. Burns's Opening Brief before the United States Court of Appeals for the Ninth Circuit, Mr. Burns had been sentenced to seven years normal incarceration as a result of a plea agreement. That plea agreement was intimately linked to a prior "free talk" agreement. In an attempt to maximize Mr. Burns's chances for survival, the State placed him in permanent restrictive custody; in so doing, the State attempted to correct its breaches by, in essence, re-sentencing Mr. Burns to seven years of solitary confinement. That is certainly a much harsher penalty than the seven years normal incarceration to which Mr. Burns was actually sentenced. This undisputed breach of the State's agreements with Mr. Burns have deprived Mr. Burns of his constitutional right to due process and that denial has inflicted significant harm upon Mr. Burns.

Moreover, even if this Court should somehow find a complete lack of cause and prejudice, Mr. Burns should still have been granted federal habeas review. No reasonable person could expect Mr. Burns, who was facing imminent severe injury or death, to forego a Petition for Special Action in favor of a time consuming appeal. *Harmon v. Ryan*, 959 F.2d 1457, 1462 (9th Cir. 1992) (Even if the [procedurally defaulted] petitioner could theoretically have complied with state procedures, the fact that he could not reasonably have been expected to is sufficient to excuse noncompliance). If, as a result of the State's violation of his constitutional rights, Mr. Burns died before his claims could be heard on direct appeal that procedure would not provide Mr. Burns with, "an adequate opportunity to be heard in court" (*Harmon* quoting *Bartone v. United States*, 375 U.S. 52, at 54, 84 S. Ct. 21, 11 L. Ed. 2d 11, (1963)). As soon as Mr. Burns learned that the Court of Appeals had declined his Petition for Special Action, he immediately filed a request for a delayed appeal, but the State Court denied both that request and a subsequent Motion for Reconsideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 16th day of September, 2002.

Vernon E. Peltz

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON SCOTT BURNS,	)	
	)	No. 01-16539
Petitioner-Appellant,	)	
	)	DC# CV-00-01933-SRB
v.	)	Arizona (Phoenix)
	)	
JAMES MCFADDEN,	)	ORDER
Warden, ARIZONA	)	
ATTORNEY GENERAL,	)	
	)	
Respondents-Appellees.	)	
	)	

(Filed June 21, 2002)

Before: SNEED, KLEINFELD and SILVERMAN, Circuit Judges

Appellant's petition for panel rehearing is **denied.**

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AARON SCOTT BURNS,

Petitioner-Appellant,

v.

JAMES MCFADDEN,
Warden; ARIZONA
ATTORNEY GENERAL,

Respondents-Appellees.

No. 01-16539

D.C. No.
CV-00-01933-SRB
MEMORANDUM*[1]

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge Presiding

Submitted January 14, 2002**[2]

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: SNEED, KLEINFELD and SILVERMAN, Circuit Judges

Arizona state prisoner Aaron Scott Burns appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition, challenging his guilty plea conviction and sentence for one count of drive-by shooting. We have jurisdiction pursuant to 28 U.S.C. § 2253. We review de novo the district court's dismissal of a habeas corpus petition on procedural grounds, *see James v. Pliler*, 269 F.3 d 1124, 1125 (9th Cir. 200 1), and we affirm.

Burns contends that the district court erred when it concluded he failed to properly exhaust his claim by presenting it in a petition for special action to the Arizona Court of Appeals. See Ariz. R. P. Spec. Act. I (stating that "the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal."). We disagree.

A state prisoner must exhaust all available state remedies before a federal court may consider the merits of his habeas corpus petition. See 28 U.S.C. § 2254(b)(1)(A); *Nino v. Galaza*, 183 F.3d 1003, 1004 (9th Cir. 1999). Exhaustion requires that a habeas petitioner "fairly present" the substance of the claim to the state courts in order to give them an opportunity to pass upon and to correct alleged violations of its prisoners' federal rights. *See Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000).

In Arizona, in order to exhaust, a petitioner must first raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-conviction relief. *See Ariz. R. Crim.* P. 32.1; *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999);

Roettgen v. Copeland, 33 F.3d 36, 38 (9th Cir. 1994).

We agree with the district court that Burns failed to exhaust available state remedies by presenting his claim in a petition for special action to the Arizona Court of Appeals. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (holding that raising a claim in a procedural context in which the merits would not be considered absent special and important reasons does not constitute fair presentation for purposes of exhaustion); *State ex rel. Romley v. Superior Court*, 7 P.3d 970, 972-3 (Ariz. Ct. App. 2000) (stating that acceptance of jurisdiction of a petition for special action is discretionary and appropriate when there is no equally plain, speedy or adequate remedy available by appeal, or when the case presents a narrow question of law of statewide importance).

Burns next contends that we should review the merits of his claim because it is procedurally barred under Arizona law. Although we agree that Burns' claim is procedurally barred under Arizona law because he can no longer file a petition for review of the trial court's denial of his first petition for post-conviction relief, *see Ariz. R. Crim.* P. 32.9(c) (stating that a petition for review must be filed within thirty days after the final decision of the trial court), we decline to reach the merits of his claim because he has demonstrated neither cause for his default and prejudice or a fundamental miscarriage of justice. *See Boyd v. Thompson*, 147 F.3d 1124, 1126-27 (9th Cir. 1998). Accordingly, the district court properly denied Burns § 2554 habeas petition.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

AARON SCOTT BURNS,	)	CASE NO. CIV
	)	00-1933-PHX-SRB
Petitioner-Appellant,	)	
	)	CERTIFICATE OF
v.	)	APPEALABILITY
	)	and
JAMES MCFADDEN,	)	ORDER TO PROCEED
et al,	)	ON APPEAL
	)	IN FORMA PAUPERIS
Respondents-Appellees.	)	
	)	

I, Susan R. Bolton Judge of the United States District Court for the District of Arizona, certify that I have examined the Petition of Aaron Scott Burns , for issuance of a Certificate of Appealability, together with the application for a Writ of Habeas Corpus filed in this Court, and FIND:

(x) that the probable cause exists for the appeal taken in the above-named cause through the United States Court of Appeals for the Ninth Circuit from the Order of this Court denying petitioner's application for Writ of Habeas Corpus, and GRANTS that petitioner be allowed to proceed in forma pauperis for appeal purposes only. The appellant has made a substantial showing of the denial of a constitutional right with respect to the following issues "*procedural default*".

( ) that the probable cause does not exist for the appeal. The applicant has not made a substantial showing of the denial of a constitutional right.

The clerk shall forthwith notify the parties of the entry of this Certificate of Appealability and Order to Proceed In Forma Pauperis on Appeal.

Dated this 2nd day of 2001.

Susan R. Bolton

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

AARON SCOTT BURNS, Petitioner, vs. WARDEN JAMES McFADDEN, et al. Respondents.	)	NO. CIV 00-1933 -PHX-SRB (SLV) NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the AARON SCOTT BURNS appeals from the Order by the Honorable Judge Susan R. Bolton, dated and entered on the 15th day of June, 2001.

RESPECTFULLY SUBMITTED this 13th day of

2001.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

AARON SCOTT BURNS,)
Petitioner,) CIV 00-1933 PHX SRB
vs.) JUDGMENT
)
WARDEN JAMES)
MCFADDEN, et al.,)
Respondents.)
)

_____Jury Verdict. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS THEREFORE ORDERED AND ADJUDGED that the Court having accepted the Report and Recommendation, the Petition is denied and this action is hereby dismissed.

Date: June 19, 2001

RICHARD H. WEARE
Clerk DCE

(By) Deputy Clerk
L. Dixon

cc: all counsel

APPENDIX F

IN THE UNITED STATES DISTRICT
FOR THE DISTRICT OF ARIZONA

AARON SCOTT BURNS,)
Petitioner,) ORDER
)
v.) No. CIV-00-
) 1933-PHX-SRB
WARDEN JAMES)
MCFADDEN ET AL.)
Respondents,)
)

The assigned Magistrate Judge issued his Report and Recommendation on or about April 27, 2001. Defendant filed an objection to the Report and Recommendation on May 14, 2001 asserting that the Magistrate Judge was in error in concluding that the Petition for Writ of Habeas Corpus filed by Petitioner cannot be reviewed because of procedural default.

The record discloses the following facts. Petitioner pled guilty on May 4, 1999 to one count of drive by shooting, a class 2 dangerous felony. He was sentenced on June 16, 1999 pursuant to the plea agreement to the minimum sentence of seven years in prison. On November 10, 1999 Petitioner filed a petition for post conviction relief in state court asserting the existence of newly discovered evidence which required that the court vacate his conviction and sentence. The information detailed in the petition for post conviction relief was that Petitioner was allegedly promised that if he provided useful information on a homicide his pending charges would be dismissed. After providing the promised cooperation he was informed that the information was useless and thereafter pled guilty to the charge stated above. In his petition for post conviction relief he asserted that he learned that the government intended to use the information he previously provided and had listed him as a witness on or about October 5, 1999. Petitioner argued that because there was an initial agreement between he and the prosecutor that if he provided information regarding a homicide the charges pending against him would be dismissed and the prosecutor intended to use his testimony he was entitled to the benefit of the initial agreement. Petitioner claimed that he was entitled to have his conviction and sentence vacated and the charges dismissed against him. He argued he was entitled to the benefit of the bargain he had made initially min with the prosecutor that if he gave information concerning the homicide the charges against him would be dismissed.

A hearing was held on January 4, 2000 on the petition for post conviction relief. Testimony was taken and exhibits were received into evidence. In its order the court summarily dismissed the petition for post conviction relief and further provided "It is ordered permitting defendant 30 days in which to file a petition for review."

No petition for review was filed challenging the dismissal of the petition for post conviction relief. Instead, Petitioner filed a petition for special action in the Arizona Court of Appeals. On February 24, 2000 the Arizona Court of Appeals declined to accept jurisdiction of the special action. The Arizona

Supreme Court also declined to review the Court of Appeals' decision.

After the Arizona Court of Appeals declined jurisdiction of the petition for special action, a second petition for post conviction was filed in the trial court on or about March 30, 2000. The sole relief sought in that petition for special action was the right to file a delayed appeal. In the attachment to the petition, Petitioner argued that he filed a petition for special action in the Arizona Court of Appeals on January 19, 2000 and while the Court of Appeals was considering the petition for special action the time for filing an appeal expired. Petitioner stated that he wished to submit the facts and arguments contained in the petition for special action as a delayed appeal in the Court of Appeals.

On April 21, 2000 the state court dismissed the second petition for post conviction relief noting that because defendant was sentenced pursuant to a plea of guilty he had no right to appeal and further noted that the deadline for seeking Rule 32 relief had passed. A motion for reconsideration was filed before the state trial court. Although the motion for reconsideration is not part of the record before the court, from the order entered by the trial judge it appears that Petitioner clarified that the appeal he was seeking was in fact a review of the denial of post conviction relief on January 4, 2000. The motion for reconsideration was denied. Petitioner also did not seek review of the denial of his second petition for post conviction relief.

A state prisoner may not petition for federal habeas relief until he has exhausted each federal claim in state court. 28 U.S.C. §§ 2254; Coleman v.

Thomas, 501 U.S. 722 (1991); Castille v. Peoples, 489 U.S. 346 (1989). To properly exhaust claims before the state court, the state prisoner must have afforded the state's highest court the opportunity to rule upon the merits of each federal constitutional claim by fairly presenting the claim to the state's highest court in a procedurally correct manner. Kim v. Villalobos, 799 F.2d 1317 (9h Cir. 1986). A federal habeas petitioner's claim is exhausted in Arizona state court when properly presented to the Arizona Court of Appeals. Swoopes v. Sublett, 196 F.3d. 1008 (9th Cir. 1999).

In this case, the Magistrate Judge found in his Report and Recommendation that Petitioner failed to submit his claim to the Arizona Court of Appeals in a procedural context in which its merits would be considered and therefore procedurally defaulted on his federal habeas claim of his denial of due process. This Court agrees.

The issues raised in this petition for habeas relief were first presented to the state trial court in a petition for post conviction relief filed pursuant to Rule 32.1(e), Arizona Rules of Civil Procedure. Petitioner asserted newly discovered material facts which should change his conviction and sentence. The newly discovered facts allegedly were the breach of an earlier agreement with the prosecutor that if his information were to be used in a subsequent homicide prosecution that the charges against him would be dismissed. Upon the denial of the petition for post conviction relief, Rule 32.9(c), Arizona Rules of Civil Procedure, allows the Petitioner 30 days after the final decision of the trial court to petition the appropriate appellant court for review. It is undisputed that Petitioner did not file a petition for review to the Arizona Court of Appeals. Instead, Petitioner filed a petition for special action naming the trial judge as the respondent and the State of Arizona as the real party in interest.

As noted in the State Bar Committee Note to Rule 3, Rules of Procedure for Special Actions, "The special action requests extraordinary relief, and acceptance of jurisdiction of a special action is highly discretionary with the court to which the application is made." The Court's threshold inquiry is whether to accept jurisdiction. The denial of a petition for special action is a denial of jurisdiction and not a judgment on the merits. King v. Superior Court, 673 P.2d 787 (Ariz. 1983). While Petitioner argues that the denial of his petition for special action was a denial of his claim on the merits he cites no authority that would support his contention. The order issued by the Arizona Court of Appeals in denying his petition stated "It is ordered that the Court of Appeals, in the exercise of its discretion, declines to accept jurisdiction of this special action."

This Court agrees with the Magistrate Judge that Petitioner's petition for special action to the Arizona Court of Appeals did not satisfy the exhaustion requirement of 28 U.S.C. § 2254 (c). Submissions of a claim to the Arizona Court of Appeals on discretionary review does not constitute fair presentation and does not satisfy the exhaustion requirement. Castille v. Peoples, supra.. In order to satisfy the exhaustion requirement Petitioner was required to file the petition for review provided in Rule 32.9(c), Arizona Rules of Civil Procedure.

The Court also notes that when Petitioner filed his second petition for post conviction relief in state court seeking a delayed appeal (or more appropriately the filing of a delayed petition for review) he similarly failed to file for review of the denial of his petition and the denial of his motion for rehearing (reconsideration) of that petition.

IT IS ORDERED OVERRULING the objections to the Report and Recommendation of the Magistrate Judge.

IT IS FURTHER ORDERED accepting the Report and Recommendation of the Magistrate Judge in this case finding that Petitioner has procedurally defaulted on his claim that he was denied due process by the state trial court. (Doc. 13-1).

IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus is denied.

DATED this 15 day of June, 2001.

SUSAN R. BOLTON
DISTRICT COURT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PERSONS IN STATE CUSTODY APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. SECTION 2254

Name: Aaron Scott Burns
Prison Number: 145100
Place of Confinement: Buckeye-Lewis
United States District Court of Arizona District of Arizona
Case No:__________ (to be supplied by Clerk of the U.S. District Court)

AARON SCOTT BURNS, Petitioner,)
)
vs.)
)
WARDEN JAMES MCFADDEN, Respondent)
)
and)
)
THE ATTORNEY GENERAL OF THE STATE OF)
ARIZONA, Additional Respondent)
_____________________________________)

Instructions-Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as a basis for prosecution and conviction for perjury. All questions must be answered concisely in the

proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Pursuant to 28 U. S.C. §2244(d)(1) and (2), this petition must be filed within I year of the latest of. (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (2) the date on which the impediment to firing an application created by State action in violation of-the Constitution or laws of the United States is removed, if-the applicant was prevented-from filing by such State action; (3) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, or (4) the date on which the factual predicate of the claim claims presented could have been discovered through the exercise of due diligence. The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent Judgment or claim is pending shall not be counted toward any period of limitation

(4) Pursuant to 28 U. S.C. §2244(b), a second or successive habeas corpus application must be authorized as provided 1 in 28 U. S.C. §2244 by a panel of the United States Court of Appeals for the Eighth Circuit before a second or successive notion may be filed in the district court. Submit a copy of the appropriate authorization with these forms if this Is a second or successive application.

(5) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(6) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis you must have an authorized officer at the penal institution complete the certificate as to, the amount of money and securities on deposit to your credit in any account in the institution.

(7) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states you must file separate petitions as to each

court.

(8) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(9) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is: 230 North First Avenue, Phoenix, Arizona 85025.

(10) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Maricopa County Superior Court

2. Date of judgment of conviction: June 17, 1999

3. Length of sentence: Seven (7) Years

4. Nature of offense involved (all counts):

Aggravated assault

5. What was your plea? (Check one)
   (a) Not guilty
   (b) Guilty X
   (c) Nolo Contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: Not Applicable

6. Kind of trial (Check one):

   (a) Jury (b) Judge only X

7. Did you testify at the trial? Yes( ) No [X]

8. Did you appeal from the judgment of conviction

   Yes[No [X]

9. If you did appeal, answer the following:

   (a) Name of court:
   (b) Result:
   (c) Date of result:

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously

filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes [X] No

11. If your answer to 10 was 'yes,' give the following information:

(a) (1) Name of court: Maricopa County Superior Court

(2) Nature of proceeding: Rule 32 Petition for Post-Conviction Relief

(3) Grounds raised: Petitioner sought specific performance as a remedy for the State's breaches of two agreements with him

(4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes [X) No [ )

(5) Result: The trial Court found that the State had breached both agreements with Petitioner, but the trial Court failed to grant any relief

(6) Date of result: January 4, 2000

(b) As to any second petition, application, or motion give the same information:

(1) Name of court: Court of Appeals, District 1

(2) Nature of proceeding: Petition for Special Action

(3) Grounds raised: The trial Court erred as a matter of law when it failed to grant any relief despite having ruled in Petitioner's favor. Mr. Burns is entitled to specific performance as a remedy for the State's breaches of its agreements With him. The State's breaches of its agreements with Mr. Burns denied Mr. Burns his right to due process

(4) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes[ ) No [X]

(5) Result: The Court of Appeals declined jurisdiction.

(6) Date of result: February 24, 2000.

(c) As to any third petition, application, or motion give the same information:

(1) Name of court: Supreme Court of Arizona

(2) Nature of proceeding: Petition for Review

(3) Grounds raised: The Court of Appeals should have accepted special action jurisdiction. The trial Court erred as a matter of law when it failed to grant any relief despite having ruled in Petitioner's favor. Mr. Burns is entitled to specific performance as a remedy for the State's breaches of its agreements with him. The State's breaches of its agreements with Mr. Burns denied Mr. Burns his right to due process

(4) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes[ ] No (X)

5. Result: The Supreme Court denied review

(6) Date of result: September 29, 2000

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes [X] No

(2) Second petition, etc. Yes [X] No

(3) Third petition, etc. Yes [X] No

(e) If you did not appeal from the adverse action on any petition, application, or motion, explain why you did not:

Not Applicable. The third applicable was to the highest court in Arizona.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION- In order to proceed in the federal court, you must-ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through 0) or any one of these grounds.

(a) Conviction obtained by a plea of guilty which was induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search or seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Because the trial Court ruled in Petitioner's favor on the Petition for Post-Conviction Relief. Mr. Burns, is entitled to specific performance, as a remedy for the State's breaches of its agreements with him; because the trial Court failed to grant any relief. Mr. Bum's incarceration is illegal.

Supporting FACTS (tell your story briefly without citing cases or law):

See attached Memorandum of Points and Authorities.

B. Ground two:

Supporting, FACTS (tell your story briefly without citing cases or law)

C. Ground three:

Supporting FACTS (tell your- story briefly without citing cases or law):

D. Ground four

Supporting FACTS (tell your story briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, arid D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:
Not Applicable

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No [X)

15. Give the name and address, if known, of Each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Humberto Rosales, 100 1 N. Central Ave., Phoenix, AZ 85004

(b) At arraignment and plea: Humberto Rosales, 1001 N. Central Ave., Phoenix, AZ 85004

(c) At trial: Humberto Rosales, 100 1 N. Central Ave., Phoenix, AZ 85 004

(d) At sentencing: Humberto Rosales, 1001 N. Central Ave., Phoenix, AZ 85004

(e) On appeal: Not Applicable

(f) In any post-conviction proceeding: Louie Carrasco, P.O. Box 2243. Tucson AZ 85702

(g) On appeal from any adverse ruling in a post-conviction proceeding: Louie Carrasco, P.O. Box 2243, Tucson, AZ 85702

3. Were you sentenced on more than one count of an indictment at the same time?
Yes ( ) No [X]

4. Do you have any future sentence to serve after

you complete the sentence imposed by the judgment under attack? Yes No [X]

(a) If so, give name and location of court which imposed sentence to be served in the future: Not Applicable

(b) And give date and length of sentence to be served in the future: Not Applicable

(c) Have you filed, or do you contemplate filing any petition attacking the judgment which imposed the sentence to be served in the future?
Yes [ ) No [ ) Not Applicable

Wherefore, petitioner prays that the Court grant petitioner relief to which petitioner may be entitled in this proceeding.

Louie Carrasco
Attorney for the Petitioner
Signature of attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct.

Executed (signed) this 5th day of October, 2000
Louie Carrasco

SUBSCRIBED AND SWORN (AFFIRMED) to before me on this 5th day of October, 2000.

Notary Public

My Commission Expires:
April 12,2004

LOUIE CARRASCO
Attorney at Law
P.O. Box 2243
Tucson, AZ 85702
(520) 623-5002
(520) 622-1781 (fax)
Az. Bar No.6246
attorney for defendant

MEMORANDUM OF POINTS AND AUTHORITIES

Aaron S. Burns, while under a felony indictment, learned of a conspiracy to commit murder. That homicide eventually occurred. Mr. Burns offered the prosecutor a "Free-talk" regarding the information information he possessed and was assured that if his information proved useful, the prosecutor would dismiss the charges against him, in exchange for his information. The "free-talk" agreement was approved by the County Attorney's Office. Due to apparent miscommunications among the several Deputy County Attorney's who were involved, a separate plea agreement ("the second agreement") was negotiated with Mr. Burns before the State completed its evaluation of the "free talk." The second agreement granted no consideration to Mr. Burns for the "free talk" information. As a result of the second agreement Mr. Burns, due to his youth and lack of any serious prior offenses, received a seven year minimum sentence. Again, Mr. Burns was granted no consideration for the information he provided, when he received the seven-year minimum sentence, which he had agreed to accept only if his fellow inmates would not learn that he was an informant for the State.

After Mr. Burns began serving his sentence in the Yuma Prison, Dakota Unit, the County Attorney's Office completed its evaluation of Mr. Burns' information. The State determined that it would use Mr. Burns' "free talk" and Mr. Burns was disclosed as a witness in the murder investigation. (For reasons that are difficult to understand at this date, the address of Mr. Burns' parents was also disclosed to the murder Defendants.) The state then prepared a summary of Mr. Burns' "free talk" and provided that transcript to the three murder defendants. By revealing Mr. Burns' identity and the detailed substance of the "free talk" the State foreclosed many defenses which the three murder conspirators might have offered. Additionally, once Mr. Burns was disclosed, the State would expect to receive and would obtain guilty pleas from those who knew an informant would testify against them.

When the State disclosed Mr. Burns as an informant and used his "free talk" against the murder Defendants, the State received the full benefit of its bargain with Mr. Burns, and Mr. Burns experienced the full detriment of the consideration which he had offered in exchange for his freedom.

The State, however, never complied with its duty of reciprocal performance - Mr. Burns never received any consideration for testifying against the murder conspirators. In fact, the State actually placed Mr. Burns in a far worse position, since he was not only serving the prison time that he bargained to avoid, but he was revealed as an informant to the numerous hard-core, long term offenders with whom he was incarcerated and at whose hands Mr. Burns was suddenly facing imminent severe injury or death. Additionally, Mr. Burns' family was also placed at risk, since the State disclosed their address to the murder defendants as well.

When Mr. Burns' counsel confronted William Perry at the County Prosecutor's office with this inequity, the County Prosecutor reversed its earlier position, suddenly deciding that Mr. Burns' testimony would not be useful after all. The State withdrew Mr. Burns' name from its witness list in the homicide prosecution, and claimed that this action restored to Mr. Burns the rights which had been denied him as a result of the State's breaches of its agreements with him.

Mr. Burns filed a Petition for Post-Conviction Relief seeking specific performance as a remedy for the breaches, in the form of dismissal of the charges against him. In the ensuing arguments before the trial court, the State admitted that it breached the first agreement when it disclosed Mr. Burns' testimony. The trial court ruled in Mr. Burns' favor on the issue of the second agreement, finding that the State had also breached that second agreement. The trial court also conceded and the State did not dispute that, as a result of the State's breaches, Mr. Burns is facing imminent severe injury or death.

Despite making the aforesaid determinations, however, the trial court refused to provide any remedy to Mr. Burns for the State's breaches of its agreements with him. Mr. Burns filed a Petition for Special Action alleging that the trial court erred as a matter of law, on an issue of statewide importance and that this error placed Mr. Burns' life at grave risk. The Court of Appeals declined jurisdiction. A Petition for Review was filed with the Arizona State Supreme Court which denied review.

The State entered into two agreements with Mr. Burns. It admitted to breaching the first of those agreements and the trial court ruled that the State breached the second agreement. Because the trial Court ruled in Petitioner's favor on the Petition for Post-Conviction Relief, Mr. Burns is entitled to specific performance as a remedy for the State's breaches of its agreements with him; because the trial Court failed to grant any relief, Mr. Burns incarceration is illegal.

A plea agreement is like a contract between the State and the defendant and is subject to contract interpretation. See Mejia v. Irwin 289 Ariz. Adv. Rep. 3, 987 P.2d 756 (Ariz App Div 1 1999); United States v. Lewis, 979 F.2d 1372 (9th Cir. 1992) An oral promise is just as binding as if written directly into the plea agreement. State v. Romero, 145 Ariz. 485, 702 P.2d 714 (Ct. App. 1985).

Specific performance is a contract remedy for breached plea agreements because those agreements are contractual in nature. As the Hovey court stated:

> Specific performance is a contract remedy for breached plea agreements because those agreements are contractual in nature. United States v. Packwood, 687 F. Supp. 471 (N.D. Cal. 1987) Specific performance, as an equitable remedy, is available where the remedy at law is inadequate. Dobbs, Remedies § 2.5 (1973).

> A contractual remedy is adequate if it places the non-breaching party in as good a legal position as that party would have enjoyed had the contract been performed.
> Dobbs, id. at 12.1

Hovey v. Superior Court In and For the County of Maricopa, 165 Ariz. 278, 798 P.2d 416, 420 (Ariz. App. 1990)

Mr. Burns performed all of the conditions of the initial agreement. The State has received the substance of the reasonably expected benefit of its bargain -- it has used Mr. Burns' testimony and disclosed him as an informant. The State, however, has not fulfilled its obligation of reciprocal performance -- it did not dismiss the charges against Mr. Burns as it was required to do under the initial agreement.

Mr. Burns was not only denied the benefit of his plea bargain, he has been placed in a far worse position, since he is now a known informant, and is incarcerated with numerous hard core, long term offenders.

The Packwood court discussed the aspect of a material breach of a plea agreement and stated:

> Few courts have discussed what constitutes a "material breach" of a plea agreement. The Ninth Circuit has followed the traditional contract principles in looking toward the reasonable expectations of the parties at the time of contracting to discover whether a given breach has deprived them of the benefit of their

bargain.

United Stated v. Packwood, 687 1 Supp 471 (N I) Ca] 1987)

When the prosecutor declined to use Mr. Burns' testimony and Mr. Burns entered into a second agreement, Mr. Burns reasonably expected that his testimony would be neither used nor disclosed to the defendants charged with murder. Though the first agreement does not explicitly state that the charges against Mr. Burns would be dismissed, that was the understanding of both parties to the contract. The State has also claimed that the first agreement permits it to unilaterally determine what consideration will be exchanged for Mr. Burns' testimony - that clause of the agreement, however, clearly does not give the State leave to first use the "free talk", and then decide that the consideration it will offer is "nothing". A breach of a plea agreement occurs not only when the state directly breaks its promise, but also when the spirit of the inducement, reasonably inferred from the written agreement, is breached." State v. Ross, 166 Ariz. 579, 804 P.2d 112 (Ct. App. 1990). The Ross Court also stated that a prosecutor commits reversible error when he violates his plea agreement with the defendant. Breaking a promise which induced the defendant to plead guilty rather than to exercise his right to a jury trial undercuts the essential fairness and integrity of our system of justice. The defendant therefore need not show actual prejudice. It is an essential component of fundamental fairness that, when a defendant and the state enter into a particular agreement, the state must comply with its promises The vast majority of cases are resolved by plea agreements -- if the State is not held to the promises it makes in these agreements, defendants will not be willing to enter into plea bargains. Additionally, informants are used in a large number of cases, and often provide evidence that would not otherwise be available. If the State is permitted to endanger the life of an informant, through an admitted breach of a pre-existing agreement informants will no longer be willing to cooperate with the State.

It has been conceded by the State and accepted by the trial Court that, due to the State's breach, Mr-Burns' life and safety cannot be effectively protected. Where the state violates a plea agreement and withdrawal from it would be an inadequate remedy, the trial court must specifically enforce the original plea agreement Hovey v. Superior Court ex rel. County of Maricopa, supra. Despite the State's admission that it breached the first agreement and the trial court's ruling that the State breached the second agreement Judge D'Angelo enforced no remedy and that decision was erroneous as a matter of law.

The State contends that, despite having already used Mr. Burns' "free-talk" to full advantage, they can repair their "error" merely by asserting that they will not require Mr. Burns' to testify at the homicide trial. This does nothing to mitigate the State's disclosure and use of Mr. Burns' testimony and does not place Mr. Burns in as good a legal position as he would have enjoyed had the contract been performed. "To allow the state to change its mind in these circumstances comports neither with ordinary contract principles nor with the more expansive notions of fundamental fairness that control the relations between a state and its citizens. " State v. Platt, 162 Ariz. 414, 783 P.2d 1206, (Ariz. App. Div.2 1989).

CONCLUSION

The State entered into two agreements with Mr. Burns and breached them both. The State has admitted to breaching the first agreement, and the trial Court ruled that the second agreement was also breached. As a result of the State breaching its agreements with him, Mr. Burns life is in danger, and the State has conceded that it cannot effectively protect him. Specific performance is the only remedy which will place Mr. Burns, as the non-breaching party, in as good a position as he would have enjoyed had the contract not been breached. The trial court's failure to provide any remedy for the State's undisputed breaches is erroneous as a matter of law and Mr. Burns' continued incarceration is illegal.

Louie Carrasco
Attorney for Petitioner

Copies of the foregoing mailed this
5th day of October, 1999 to:

William E. Perry III
Maricopa County Attorney
301 W. Jefferson
Phoenix, AZ 85003

Gerald R. Grant
Deputy County Attorney
100 W. Washington
Phoenix, AZ 85003

APPENDIX H

SUPREME COURT
STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
150 1 WEST WASHINGTON STREET
PHOENIX. ARIZONA 85007-3231
TELEPHONE. (602) 542-9396

September 7, 2000

RE: AARON SCOTT BURNS vs HON PETER D'ANGELO/STATE
Arizona Supreme Court No. CV-00-0099-PR
Court of Appeals Division One No. 1 CA-SA 00-0020
Maricopa County Superior Court No. CR 98-06715

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 06, 2000, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Chief Justice Zlaket, Justice Feldman, and Justice McGregor participated in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 7th day of September, 2000.

Noel K Dessaint, Clerk

TO:
Louie Carrasco Richard M Romley, Esq., Maricopa County Attorney Attn: Gerald R Grant, Esq. Hon. Janet A Napolitano, Esq., Arizona Attorney General Attn: Paul J McMurdie, Esq. Hon. Peter T D'Angelo, Retired Judge, Maricopa County Superior Court West Publishing Company
Lexis-Nexis V
Glen D Clark, Clerk, Court of Appeals Division one, Phoenix
rs

APPENDIX I
SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

06/16/2000

CLERK OF THE COURT
FORM R000A

G. Perez
Deputy

HONORABLE DAVID R. COLE

CR 1998-006715

FILED:__________
GERALD R GRANT

STATE OF ARIZONA
v.
AARON SCOTT BURNS

LOUIE CARRASCO

APPEALS-PCR-CCC
VICTIM WITNESS
DIV-CA-CCC

MINUTE ENTRY

The Court has received Defendant's motion for Reconsideration in connection with the order dated April 21, 2000. Having reviewed the Motion for

Reconsideration, it appears that the purpose of Defendant's Petition for Post-Conviction Relief dated March 20, 2000, was to seek review in connection with Judge D'Angelo's January 4, 2000, order, denying relief in connection with a previous Petition for Post-Conviction Relief. If that is what was intended, the March 20 pleading was not timely filed. Therefore,

IT IS ORDERED denying the Motion for Reconsideration.

APPENDIX J

LOUIE CARRASCO
Attorney at Law
P.O. Box 2243
Tucson, AZ 85702

(520) 623-5002
(520) 622-1781 (fax)
Az. Bar No.6246
attorney for defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. AARON SCOTT BURNS, Defendant.	NO. CR-1998-006715 MOTION FOR RECONSIDERATION (Assigned to Judge David R. Cole)

On May 4, 2000, this Court denied the March 16, 2000 Petition for Post-Conviction Relief filed by Aaron Burns on the grounds that (1) Mr. Burns' "sole response to the question concerning eligibility for relief is that his lawyer failed to file a notice of appeal" and (2) Mr. Burns "had no right to appeal" because he pled guilty as part of a plea bargain.

Mr. Burns, through counsel undersigned

respectfully asserts that the Court erred on both of these points: (1) The Court appears to have overlooked paragraph 5 of the Petition for Post-Conviction Relief, wherein Mr. Burns states to the Court that "facts in support of the alleged error(s) upon which this petition is based are contained in Attachment A;" the Court also appears to have overlooked said Attachment A. (2) Mr. Burns does not wish to file an appeal regarding the matter in which he pled guilty; instead, Mr. Burns is seeking to appeal the Court's refusal to grant his earlier Petition for Post-Conviction relief.

That first Petition stemmed from the fact that the State breached a "free-talk" agreement by using Mr. Burns' testimony against three murder defendants, without providing to Mr. Burns the State's reciprocal consideration. When the State disclosed Mr. Burns as an informant and used his testimony against the murder Defendants, it received the full benefit of its bargain with Mr. Burns, and Mr. Burns experienced the full detriment of the consideration which he had offered in exchange for his freedom. The State, however, never complied with its duty of reciprocal performance – Mr. Burns never received any consideration for testifying against the murder conspirators. In fact, the State actually placed Mr. Burns in a far worse position, since he was not only serving the prison time that he bargained to avoid, but he was revealed as an informant to the numerous hard core, long term offenders with whom he was incarcerated and at whose hands Mr. Burns was suddenly facing imminent severe injury or death.

Mr. Burns filed the original Petition for Post-Conviction Relief at issue here, seeking specific performance as a remedy for the breach of the "free-talk" agreement. In the ensuing arguments before the trial court, the State admitted that it breached the "free-talk" agreement when it disclosed Mr. Burns' testimony. The trial court ruled in Mr. Burns favor, finding that the State had also breached its subsequent plea bargain agreement with Mr. Burns wherein Mr. Burns pled guilty. Despite making the aforesaid determinations, however, the trial court refused to provide any remedy to Mr. Burns for the State's breaches of its agreements with him and the trial Court denied that original Petition for Post-Conviction Relief. It is this denial of Post-Conviction Relief which Mr. Burns wishes to appeal.

Since the trial court had conceded, and the State had not disputed, that, as a result of the State's breaches, Mr. Burns was facing imminent severe injury or death, Mr. Burns filed a Petition for Special Action alleging that the trial court erred as a matter of law, on an issue of statewide importance. While the Court of Appeals was considering the Petition for Special Action, however, the time for the filing of an appeal in this matter passed. The Court of Appeals then declined Special Action jurisdiction.

Petitioner's attorney believed, and still believes that Special Action jurisdiction is appropriate and a Petition for review of that question is presently before the State Supreme Court. In the interim, however, because the Court of Appeals declined special action jurisdiction, Petitioner wishes to submit the facts and arguments contained in the Petition for Special Action as a delayed appeal to the Court of Appeals.

Should the Supreme Court decline review, or rule that special action jurisdiction was not appropriate, Petitioner will have no available avenue for appeal and that situation would be due entirely to his attorney's decision to file a special action, rather than an appeal. Petitioner himself is not responsible for the delay in filing the appeal, and he therefore should not be denied the opportunity for appeal solely because of his attorney's decisions to seek relief through a petition for special action; see State ex rel. Neely v. Rodriguez, 165 Ariz. 74,796 P.2d 876 (Ariz. 1990), "Delayed appeals are allowed to criminal defendants to protect them from error in situations... where their attorneys have failed to timely appeal.;" see also Rule 32.1(f), Ariz. R.Crim. P.

The circumstance at bar is exactly the type of situation where a delayed appeal is appropriate. Mr. Burns therefore requests that the Court reconsider its ruling and grant his Petition for Post-Conviction relief, allowing Mr. Burns to file a delayed appeal of the Court's denial of his original petition.

Respectfully submitted this 5th th day of June, 2000.

Louie Carrasco, Attorney for Petitioner

Copy of the foregoing mailed
this 5th day of June, 2000 to:

William E. Perry III
Maricopa County Attorney
301 W. Jefferson
Phoenix, AZ 85003

APPENDIX K

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

04/21/2000

CLERK OF THE COURT
FORM ROOOA

G. Perez
Deputy

HONORABLE DAVID R. COLE

CR9806715

FILED: MAY 0 4 2000
WILLIAM E. PERRY III

STATE OF ARIZONA
v.
AARON SCOTT BURNS

LOUIE CARRASCO
APPEALS-PCR-CCC
VICTIM WITNESS
DIV-CA-CCC

MINUTE ENTRY

The court has received Defendant's Petition for Post-Conviction Relief filed March 20, 2000. His sole response to the question concerning eligibility for relief is that his lawyer failed to file a notice of appeal. Because Defendant was sentenced pursuant to a plea of guilty, he had no right to appeal. He had the right to seek relief pursuant to Rule 32, Ariz. R. Crim.P.; however, because he was sentenced on June 17, 1999, the deadline for seeking such relief passed months ago. Because it was not timely filed,

IT IS ORDERED dismissing the Petition for Post-Conviction Relief filed March 20, 2000.

APPENDIX L

SUPREME COURT OF ARIZONA

AARON SCOTT BURNS
Petitioner,

vs.

THE HONORABLE
PETER T. D'ANGELO.
Judge of the Superior
Court of the State of
Arizona, in and for the
County of Maricopa,
Respondent,

and

STATE OF ARIZONA,
Real Party In
Interest.

No.
Court of Appeals, Div. I
CA-00-0020
Maricopa County
Superior Ct. No.
CR-1998-006715

PETITION FOR REVIEW

LOUIE CARRASCO
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TABLE OF CONTENTS

Page

CERTIFICATE OF MAILING.............................iii

CERTIFICATE OF COMPLIANCE.....................iv

TABLE OF AUTHORITIES.................................v
    CASES v
    STATUTES vi

ISSUES DECIDED BY THE COURT OF APPEALS WHICH PETITIONER WISHES TO PRESENT TO THE SUPREME COURT FOR REVIEW......................1

ADDITIONAL ISSUES PRESENTED TO, BUT NOT DECIDED BY THE COURT OF APPEALS..........1

STATEMENT OF MATERIAL FACTS..................1

REASONS WHY PETITION SHOULD BE GRANTED..4
    I SPECIAL ACTION JURISDICTION SHOULD HAVE BEEN ACCEPTED BECAUSE ANY DELAY PLACED PETITIONER'S LIFE AT GRAVE RISK...4
    II SPECIAL ACTION JURISDICTION

SHOULD HAVE BEEN ACCEPTED BECAUSE THIS CASE INVOLVES PURELY LEGAL QUESTIONS OF STATEWIDE IMPORTANCE..........6

III SPECIAL ACTION JURISDICTION SHOULD HAVE BEEN ACCEPTED TO RESOLVE THE CONSTITUTIONAL AND PUBLIC POLICY ISSUES 8

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing, postage prepaid, on the 16th day of March, 2000, to:

Gerald R. Grant
Maricopa County Attorney
100 W. Washington Phoenix, AZ 85003

CERTIFICATE OF COMPLIANCE

COMES NOW the undersigned attorney, and hereby files his Certificate of Compliance pursuant to Arizona Revised Statues Annotated Rules of Civil Appellate Procedure Rule 14. The Petition for Review filed with this Court on March 2000 was double-spaced using proportionately-spaced type face Times New Roman, 12-point size, and the word count was 3334, and the total pages are 9.

DATED this 16th day of March, 2000.

TABLE OF AUTHORITIES

CASES **Page**

Andrade v. Superior Court, 183 Ariz. 113, 901 P.2d 46 1, (App. 1995) 7

Bechtel v. Rose, 150 Ariz. 68, 722 P.2d 236 (1986) 4,5

Hovey v. Superior Court, 165 Ariz. 278, 798 P.2d 416 (Ariz. App. 1990)..1,7-9

J.A.R. v. Superior Court, 179 Ariz. 267, 877 P.2d 1323, (App. 1994) 5

Mabry v. Johnson, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) 9

Martin v. Reinstein, 1999 WL 298273, (Ariz.App. Div. 1 1999) 7

Mejia v. Irwin 289 Ariz. Adv. Rep. 3, 987 P.2d 756 (Ariz. App. Div 1 1999)......................................6

Sanchez v. Coxon, 175 Ariz. 93, 854 P.2d 126, (Ariz. 1993) 8

Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)..................................8,9

State v. Georgeoff, 163 Ariz. 242, 787 P.2d 141(Ariz. App. 1989)..9

State v. Melendez, 172 Ariz. 68, 834 P.2d 154 (1992) **8**

State v. Romero, 145 Ariz. 485, 702 P.2d 714 (Ct. App. 1985) **7**

State v. Ross, 166 Ariz. 579, 804 P.2d 112 (Ct. App. 1990)... **7**

State v. Superior Court, 187 Ariz 411, 930 P.2d 488 .... **7**

State v. Superior Court, County of Navajo, 190 Ariz. 203, 945 P.2d 1334, (App. 1997)..................... **8**

Stephenson v. Nastro, 192 Ariz. 475, 967 P.2d 616 (App. 1998) **5**

United States v. Lewis, 979 F.2d 1372 (9th Cir. 1992) **6**

United States v. Packwood, 687 F. Supp 471 (ND Cal. 1987) **7**

STATUTES **Page**

Arizona Constitution, Article 2, § 4...................... **1,8**

United States Constitution,
Amendment XIV, § 1... **1,8**

ISSUES DECIDED BY THE COURT OF APPEALS WHICH PETITIONER WISHES TO PRESENT TO THE SUPREME COURT FOR REVIEW

Is special action jurisdiction appropriate when the State's breach of an agreement endangers a Petitioner's life and safety?

Did the Court of Appeals err in denying special action jurisdiction?

ADDITIONAL ISSUES PRESENTED TO, BUT NOT DECIDED BY THE COURT OF APPEALS

Did the trial court err as a matter of law when it failed to provide any relief to Mr. Burns, despite finding that the State had breached two agreements with Mr. Burns?

Is Mr. Burns entitled to specific performance as a remedy for the State's breaches of its agreements with him, pursuant to Hovey v. Superior Court, 165 Ariz. 278, 798 P.2d 416 (Ariz. App. 1990)?

Did the State's breaches of its agreements with Mr. Burns deny Mr. Burns his right to due process which is guaranteed by the U.S. Const. amend. XIV § 1 and Ariz. Const. art. 2, § 4?

STATEMENT OF MATERIAL FACTS

Aaron S. Burns, while under a felony indictment, learned of a conspiracy to commit murder. That homicide eventually occurred. Mr. Burns offered the prosecutor a "free-talk" regarding the information he possessed and was assured that if his information proved useful, the prosecutor would dismiss the charges against him, in exchange for his information. The "free-talk" agreement (Petition for Special Action, Exhibit #1) was approved by the County Attorney's Office. Due to apparent mis-communications among the several Deputy County Attorney's who were involved, a separate plea agreement ("the second agreement") was negotiated with Mr. Burns before the State completed its evaluation of the "free talk". The second agreement granted no consideration to Mr. Burns for the "free talk" information. As a result of the second agreement, Mr. Burns, due to his youth and lack of any serious prior offenses, received a seven year minimum sentence. Again, Mr. Burns was granted no consideration for the information he provided, when he received the seven-year minimum sentence, which he had agreed to accept only if his fellow inmates would not learn that he was an informant for the State.

After Mr. Burns began serving his sentence in the Yuma Prison, Dakota Unit, the County Attorney's Office completed its evaluation of Mr. Burns' information. The State determined that it would use Mr. Burns' "free talk" and Mr. Burns was disclosed as a witness in the murder investigation. (For reasons that are difficult to understand at this date, the address of Mr. Burns' parents was also disclosed to the murder Defendants.) The state then prepared a summary of Mr. Burns' "free talk" (Petition for Special Action, Exhibit #2) and provided that transcript to the three murder defendants. By revealing Mr. Burns' identity and the detailed substance of the "free talk" the State foreclosed many defenses which the three murder conspirators might have offered. Additionally, once Mr. Burns was disclosed, the State would expect to receive and would obtain guilty pleas from those who knew an informant would testify against them.

When the State disclosed Mr. Burns as an informant and used his "free talk" against the murder Defendants, the State received the full benefit of its bargain with Mr. Burns, and Mr. Burns experienced the full detriment of the consideration which he had offered in exchange for his freedom. The State, however, never complied with its duty of reciprocal performance - Mr. Burns never received any consideration for testifying against the murder conspirators. In fact, the State actually placed Mr. Burns in a far worse position, since he was not only serving the prison time that he bargained to avoid, but he was revealed as an informant to the numerous hard core, long term offenders with whom he was incarcerated and at whose hands Mr. Burns was suddenly facing imminent severe injury or death. Additionally, Mr. Burns' family was also placed at risk, since the State disclosed their address to the murder defendants as well.

When Mr. Burns' counsel confronted William Perry at the County Prosecutor's office with this inequity, the County Prosecutor reversed its earlier position, suddenly deciding that Mr. Burns' testimony would not be useful after all. The State withdrew Mr. Burns' name from its witness list in the homicide prosecution, and claimed that this action restored to Mr. Burns the rights which had been denied him as a result of the State's breaches of its agreements with him.

Mr. Burns filed a Petition for Post-Conviction Relief seeking specific performance as a remedy for the breaches, in the form of dismissal of the charges against him. In the ensuing arguments before the trial court, the State admitted that it breached the first agreement when it disclosed Mr. Burns' testimony. The trial court ruled in Mr. Burns favor on the issue of the second agreement, finding that the State had also breached that second agreement. The trial court also conceded and the State did not dispute that, as a result of the State's breaches, Mr. Burns is facing imminent severe injury or death.

Despite making the aforesaid determinations, however, the trial court refused to provide any remedy to Mr. Burns for the State's breaches of its agreements with him. Mr. Burns filed a Petition for Special Action alleging that the trial court erred as a matter of law, on an issue of statewide importance and that this error placed Mr. Burns' life at grave risk. The Court of Appeals declined jurisdiction, giving rise to the instant Petition for Review.

REASONS WHY PETITION SHOULD BE GRANTED

I SPECIAL ACTION JURISDICTION SHOULD HAVE BEEN ACCEPTED BECAUSE ANY DELAY PLACED PETITIONER'S LIFE AT GRAVE RISK

The Court of Appeals should have accepted special action jurisdiction in the present situation, since Mr. Burns' safety and quite possibly his very life, have been placed at risk by the trial court's refusal to grant any relief, despite its own ruling in Mr. Burns' favor. Special action relief was and is appropriate because Mr. Burns had no adequate, equally plain, speedy remedy available to him by the appeal process he could suffer severe physical injury or death at any moment as a result of the State's undisputed breaches of its agreements with him. This is not a typical criminal appeal matter, where the greatest prejudice to the Defendant would be a little extra time spent in prison. This is a matter of life and death and surely nothing could be more prejudicial to Mr. Burns than severe injury or death. Every day that goes by places Mr. Burns in extreme danger and both the State and the trial court have repeatedly acknowledged this fact.

Although acceptance of special action jurisdiction is discretionary, jurisdiction should properly be exercised in cases such as this where an appeal might involve unconscionable delay, and would simply delay by months or perhaps years, the resolution of the very same questions as are raised by the petition for special action.

In Bechtel v. Rose, 150 Ariz. 68, 71, 722 P.2d 236, 239 (1986), the supreme court held that the appealability of a matter should not preclude special action jurisdiction where the appeal is not an equally plain, speedy, or adequate remedy. The Bechtel court afforded special action review of an order denying the grandmother's motion to intervene in a dependency action, even though that denial was an appealable order, for the following reasons:

> We must be mindful that we are dealing with the care and custody of a very young child and vigilant to protect his right to a suitable and speedy placement. "When the urgent and agonizing nature of the numerous proceedings affecting custody is taken into consideration,

> with the resulting detriment to the [child] involved, it is apparent that the ultimate remedy available to petitioner by way of appeal is neither plain, speedy, nor adequate" ......
>
> Where the facts of a case so compel, we have not hesitated to grant extraordinary relief... The facts of this case equally compel exercise of our jurisdiction.... An appeal might involve unconscionable delay, and even then 'the very question before us now would be before us then, only months or perhaps years later.

Bechtel v. Rose, 150 Ariz. at 71-72, 722 P.2d at 239-40 (citations omitted).

The Court of Appeals, Division 1, reached a similar conclusion in J.A.R. v. Superior Court In and For County of Maricopa 179 Ariz. 267, 877 P.2d 1323, (App. 1994), stating:

> Because... this case involves the custody placement of a young child, as well as a significant issue of law that may be decided as well now as in a later appeal that may involve unconscionable delay in resolving the child's placement, we accept special action jurisdiction.

J.A.R. v. Superior Court, 179 Ariz. 267 at 273, 877 P.2d 1323 at 1329

More recently, the Division I Court of Appeals accepted special action jurisdiction due to the need for "speedy resolution" in a custody matter, Stephenson v. Nastro, 192 Ariz. 475, 967 P.2d 616

(App. 1998).

Although the welfare of children is certainly an important matter, requiring speedy resolution, Mr. Burns' situation is at least as urgent - his very life has been placed at risk, because the State has breached two agreements with him. While it is unquestionably more palatable to address the needs of a child than the needs of a convict, the Court of Appeals is charged with seeing justice done, without unconscionable delay, regardless of how unpleasant their job might be. Although Mr. Burns is a convict, he has a right to justice under Arizona law the State no longer disputes that it has already violated those rights in breaching two agreements with Mr. Burns. This wrong should not be compounded by continuing to expose Mr. Burns' to the imminent risk of injury or death during the delay that will result from an appeal in this matter.

II SPECIAL ACTION JURISDICTION SHOULD HAVE BEEN ACCEPTED BECAUSE THIS CASE INVOLVES PURELY LEGAL QUESTIONS OF STATEWIDE IMPORTANCE

The State has admitted that it breached the first agreement; the trial court ruled that the State breached the second agreement, and the State did not appeal that ruling. Therefore, all that remains is to determine whether Mr. Burns is entitled to specific performance as a matter of law to remedy the State's breaches.

There are no facts in dispute - this is purely a question of law, and that question is one- of statewide importance. The vast majority of criminal cases are resolved by plea agreements -- if the State is not held to the promises it makes in these agreements, defendants and witnesses will not be willing to enter into plea bargains. Additionally, police and prosecutors rely on the use of informants both to obtain enough information to charge criminals and also to successfully prosecute them. If the State is permitted to endanger the life of an informant, through an admitted breach of an agreement, informants will no longer be willing to cooperate with the State.

The trial Court provided no relief whatsoever for the State's breaches of its agreements, despite its determination in Mr. Burns' favor and despite Arizona law which required the trial court to grant specific performance as a remedy. Both Mejia v. Irwin 289 Ariz. Adv. Rep. 3, 987 P.2d 756 (Ariz. App. Div 1 1999) and United States v. Lewis, 979 F.2d 1372 (9th Cir. 1992) establish that a plea agreement is subject to contract interpretation. State v. Romero, 145 Ariz. 485, 702 P.2d 714 (Ct. App. 1985) similarly establishes that the State's oral promise to dismiss the charges against Mr. Burns is just as binding as if it were written directly into the first agreement. United States v. Packwood, 687 F. Supp 471 (ND Cal. 1987) also supports the proposition that the reasonable expectations of the parties at the time of contracting are used to determine whether or not a given breach has deprived them of the benefit of their bargain. State v. Ross, 166 Ariz. 579, 804 P.2d 112 (Ct. App. 1990) also supports this contention, stating, "A breach of a plea agreement occurs not only when the state directly breaks its promise, but also, when the spirit of the inducement, reasonably inferred from the written agreement, is breached." Lastly, Hovey v. Superior Court, 165 Ariz. 278, 798 P.2d 416 (Ariz. App. 1990) strongly supports specific performance as a contract remedy for breached plea agreements and establishes that, when the state violates a plea agreement and withdrawal from it would be an inadequate remedy, the trial court must specifically enforce the original plea agreement ("Returning [the Defendant] to his position prior to the plea is no relief at all. Specific performance provides the only appropriate relief.").

The exercise of special action jurisdiction is appropriate if a case involves purely legal questions which do not require resolution of any facts, or questions of public or statewide importance. See Martin v. Reinstein, 295 Ariz. Adv. Rep. 21, 987 P.2d 779, (App. 1999); Andrade v. Superior Court, 183 Ariz. 113, 115, 901 P.2d 461, 463 (App. 1995), State v. Superior Court, 187 Ariz 411, 414, 930 P.2d 488, 491; see also City of Tucson v. Superior Court, 167 Ariz. 513, 513, 809 P.2d 428, 428 (1991) (special action jurisdiction properly accepted when "the issue presented is a pure issue of law that is of statewide significance"). See also Sanchez v. Coxon, 175 Ariz. 93, 854 P.2d 126, (Ariz. 1993) where special action jurisdiction was accepted for the same reasons, and State v. Superior Court In and For County of Navajo, 190 Ariz. 203, 945 P.2d 1334, (App. 1997) where jurisdiction was accepted in a special action because, inter alia, the trial court committed a plain and obvious error, and the action involved a purely legal. question of statewide significance.

III SPECIAL ACTION JURISDICTION SHOULD

HAVE BEEN ACCEPTED TORESOLVE THE CONSTITUTIONAL AND PUBLIC POLICY ISSUES

It is an essential component of fundamental fairness that, when a defendant and the state enter into a particular agreement, the state must comply with its promises. The fundamentally unfair conduct of the State in this situation raises issues of violation of due process which are properly brought via special action; see U.S. Const. amend. XIV, § 1; Ariz. Const. art. 2, § 4; see also State v. Melendez, 172 Ariz. 68, 71, 834 P.2d 154, 157 (1992) (the touchstone of due process under the Arizona and federal constitutions is fundamental fairness).

Hovey v. Superior Court, supra concerned a breached plea agreement which had far less serious implications for the Defendant than Mr. Burns is now facing; Mr. Hovey's offense was also more serious than this defendant's. Although Mr. Hovey's situation was not as compelling as that of Mr. Burns, the Court of Appeals, Division I granted special action review, recognizing the applicability of a due process analysis to situations involving breached plea agreements. The Hovey court stated that:

> A criminal defendant's guilty plea must be voluntary and intelligent. An agreement that rests in any significant degree on promises made by a prosecutor is deprived of its voluntary and intelligent character if those promises are not fulfilled. Santobello v. New York [404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)]... The breach [of a plea agreement] violated Hovey's due process rights under the

> fourteenth amendment to be granted fulfillment of the promises used to elicit his plea. Santobello, supra; State v. Georgeoff, 163 Ariz. 434, 788 P.2d 1185 (1990). See also Mabry v. Johnson, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984)."

Hovey v. Superior Court, 165 Ariz. 278 at 281, 798 P.2d 416 at 419 (Ariz. App. 1990)

Finally, there is more at risk here than Mr. Burns life and safety. The principles articulated in 1989 by the Arizona Court of Appeals, Division I in State v. Georgeoff, 163 Ariz. 242, 787 P.2d 141 (Ariz. App. 1989) are as applicable now as they were then:

> [I)n the context of a broken plea agreement, there is more at stake than the liberty of the defendant or the length of his term. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice... (citations an quotes omitted).

State v. Georgeoff, 163 Ariz. 242 at 245, 787 P.2d 141 at 144 (Ariz. App. 1989).

For the reasons set forth above, Petitioner respectfully requests that the Supreme Court accept review of this matter.

Respectfully submitted this 16th day of March, 2000.

Louie Carrasco,
Attorney for Petitioner

APPENDIX M

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AARON SCOTT BURNS, Petitioner, v.	1 CA-SA 00-0020 DEPARTMENT D
THE HONORABLE PETER T. DIANGELO, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge,	MARICOPA County Superior Court No. CR 98-06715 **ORDER**
STATE OF ARIZONA, Real Party in Interest.	

This special action came on regularly for conference this 23rd day of February, 2000, before Presiding Judge Jefferson L. Lankford and Judges Cecil B. Patterson, Jr., and Sheldon H. Weisberg, and the matter was taken under advisement. After consideration,

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, declines to accept jurisdiction of this special action.

DATED this 24th day of February, 2000.

A JEFFERSON L. LANKFORD
Presiding Judge

Page 2

1 CA-SA 00-0020

February 24, 2000

MARICOPA COUNTY
Superior Court
CR 98-06715

A true copy of the foregoing
order was mailed
February 24, 2000 to:

Mr. Louie Carrasco
ATTORNEY AT LAW
P 0 Box 2243 Tucson, AZ 85702
Attorney for Petitioner

Mr. Gerald R. Grant
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Phoenix, AZ 85003

Attorneys for Real Party in Interest

Mr. Paul J. McMurdie
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Criminal Appeals Section
1275 West Washington Street
Phoenix, AZ 85007-2997

Honorable Peter T. D'Angelo, Judge
MARICOPA COUNTY SUPERIOR COURT
Central Court Building
201 West Jefferson Street
Phoenix, AZ 85003-2205
Respondent Judge

Mr. Michael K. Jeanes, Clerk
MARICOPA COUNTY SUPERIOR COURT
Central Court Building
201 West Jefferson Street
Phoenix, AZ 85003

Glen D. Clark, Clerk

APPENDIX N

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

01/04/2000 CLERK OF THE COURT
FORM R000A

HON. PETER T. D'ANGELO A. Moore
Deputy

CR 1998-006715

STATE OF/ARIZONA

v.

AARON SCOTT/BURNS

FILED: JAN 0 7 2000
WILLIAM E/PERRY III

LOUIE CARRASCO
APPEALS-CCC
VICTIM WITNESS DIV-CA-CCC

MINUTE ENTRY

8:48 a.m. This is the time set for informal conference re Petition for Post-Conviction Relief. State is represented by William Perry. Defendant's presence having been waived, Defendant is represented by Louie Carrasco.

Court Reporter Elva Cruz-Lauer is present.

A discussion is held.

Counsel requesting to contact Daniel Larsen and Humberto Rosales for testimony.

9:58 a.m. Court stands at recess.

Defendant's Exhibits 2 and 3 are marked for identification.

10:54 a.m. Court reconvenes with respective counsel present.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

01/04/2000

CLERK OF THE COURT
FORM R000A

HON. PETER T. D'ANGELO

A. Moore
Deputy

CR 1998-006715

Court Reporter Elva Cruz-Lauer is present.

Humberto Rosales is sworn and testifies.

Defendant's Exhibit 2 is received in evidence.

Defendant's Exhibit -3 is received in evidence.

The witness is excused.

Daniel J. Larson is sworn and testifies.

The Court will summarily dismiss the Petition for Post-Conviction Relief.

IT IS ORDERED permitting Defendant 30 days in which to file a Petition for Review.

FILED: Exhibit Worksheet.

11:34 a.m. Matter concludes.

APPENDIX O

OFFICE OF THE MARICOPA COUNTY ATTORNEY
RICHARD M. ROMLEY
COUNTY ATTORNEY

Direct Phone Line: 506-5793 Direct Fax 506-7950

January 4, 2000

April Robinson
Protective Segregation Specialist
Arizona Department of Corrections
1601 W. Jefferson, Mail Code 221
Phoenix, AZ 85007

Re: Inmate Aaron Scott Burns Maricopa County Superior Court CRI 998-006715, DOC # 145100

Dear April:

Aaron Scott Burns entered into a free talk agreement with the State of Arizona and gave information regarding the case of State v. Caliri, Parker, and Givens. The first prosecutor on the case evaluated the information and decided not to use it. Burns entered into a plea agreement without any co-operation involved and was sentenced to DOC.

A second attorney on the case did not realize what had occurred. He disclosed Burns as a witness, and disclosed his statement during the free talk. That lawyer left the office and I was assigned to the case. I withdrew Burns as a witness. He has filed a post conviction release petition which is pending.

One of the defendants in the case is Larry Holt Givens, DOC # 92136. Givens is aware of Burns' statement. Givens is charged with First Degree Murder and the death penalty has been alleged. Due to the mistake of the State in this case Burns may be at risk. Please do everything possible to see that he is protected.

Sincerely,

William E. Perry III
Deputy County Attorney

APPENDIX P

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,)
Plaintiff,) CR98-06715
vs.)
)
AARON SCOTT BURNS,)
Defendant.)
)

Phoenix, Arizona
January 4, 2000
8:30 o'clock a.m.

BEFORE: The Honorable Peter T. D'Angelo, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Informal Conference)

REPORTED BY: ELVA CRUZ-LAUER, RPR

INDEX

	D	C	RD
DEFENDANT'S WITNESS:			
ROSALES, Humberto	12	18	23
STATE'S WITNESS:			
LARSON, Daniel J.	30	34	

EXHIBITS

DEFENDANT'S EXHIBITS:

Exhibit 2	(Copy of letter dated 10-5-99)	27
Exhibit 3	(Copy of Phoenix Police Report)	29

APPEARANCES:

For the State:	MR. WILLIAM PERRY, Deputy County Attorney,
For the Defendant:	MR. LOUIE CARRASCO, Attorney at Law

Phoenix, Arizona
January 4, 2000
8:30 o'clock a.m.

(ELVA CRUZ-LAUER was duly sworn to act as the Official Court Reporter herein.)

(Whereupon, the following proceedings were held in chambers.)

THE COURT: 98-06715, State versus Aaron Scott Burns, informal conference re Petition for Post-Conviction Relief.

MR. PERRY: William Perry for the State. I contacted the victim. He said he was going to be here. I am not sure he is here. He may be waiting outside.

THE COURT: Why don't you go look.

MR. PERRY: Okay.

(Whereupon, the following proceedings were held in open court.)

THE COURT: Recall 98-06715, State of Arizona versus Aaron Scott Burns, informal conference re Petition for Post-Conviction Relief.

MR. PERRY: William Perry for the State. The victim Winfredo Escobar has been notified and is not here yet.

THE COURT: Very well.

MR. CARRASCO: Lou Carrasco on behalf of the defendant, Your Honor, whose presence I have waived.

THE COURT: All right. Mr. Perry, when last we spoke regarding this matter, you wanted to review the authority cited by Mr. Carrasco.

MR. PERRY: That's correct, Your Honor. I haven't found anything additional. I have looked at the authority that he cited.

It is the State's position that there was a free talk agreement, that there was a separate written plea agreement, a separate written plea agreement that is binding on the Court. There was no mention of cooperation and there was no violation of the plea agreement.

We have taken additional steps to ensure Mr. Burns' safety since the last time we met. He has been placed in protective custody in process for that being made on a more permanent basis.

I have had discussions with DOC authorities and I have written a letter to the protective segregation specialist, April Robinson, requesting that they protect him as best they can.

I think that that is all we can do under these circumstances. It is -- this is something that should not have happened. They will make every effort to make sure he is protected, but this is not a violation of the plea agreement. This is not something where the plea agreement should be set aside.

THE COURT: Are you referring to the plea agreement in this cause number?

MR. PERRY: That's correct, Your Honor.

THE COURT: Okay.

MR. PERRY: As opposed to Exhibit 1, which is the cooperation agreement, which the Court has.

THE COURT: Now, Mr. Carrasco, you wish to make any further record?

MR. CARRASCO: Yes, Your Honor. I don't know how much time to spend on this, Your Honor. In terms of the safety issue, I have a witness here, Mr. John Sloss, who has addressed this Court and many others here generally on presentence matters. He has a great deal of expertise regarding the Arizona prison system.

THE COURT: Unfortunately, I have nothing to do with that.

MR. CARRASCO: Okay. I guess the main issue that I wish the Court to be well apprised of is the fact that there is nothing the present system can do to solve this problem. Right now, as of our last hearing a little bit before Christmas, I guess Mr. -- the prosecutor contacted -Mr. Perry contacted somebody in the prison system, and they took him out of the lock down where he was at and they put him into a different lock down.

I spoke to Mr. Stutzman up there in the prison system and they had him classified as a 5.5, which is the people that have done -- have been real dangerous and have actually assaulted guards and done terrible things like that.

So that is the fate that awaits my client if this Court doesn't act to enforce the agreement.

THE COURT: What agreement are you talking about, Mr. Carrasco?

MR. CARRASCO: Your Honor, my client had an agreement to provide information to the prosecutor regarding a homicide that occurred after his own crime had been committed and while he was awaiting trial that he learned about.

I supplied the Court, I think, with a copy of the transcript of the free talk that he actually gave. In that free talk he tells - he tells the prosecutor about some significant details that were related to him when the people that are accused of the homicide were in fact planning it before they actually ever committed it. He gives them crucial details about their plan, the fact that they are in fact conspiring to do this, and some details that I think leads to some very significant evidence. Now -

THE COURT: Can you point out to me in the transcript where there is this so-called agreement?

MR. CARRASCO: The agreement? The agreement, Your Honor, I think is in the exhibit that was most recently provided to you at the last hearing.

THE COURT: Well, this exhibit, Exhibit 1 to this hearing, specifically states that, "it is also understood that the defendant is not entitled at this juncture to any specific consideration regarding the charges against him just because he would have given to the prosecution such a statement. Such consideration, if any at all, will be unilaterally determined by the Maricopa County Attorney's Office only after the statement is made."

Did I read that correctly?

MR. CARRASCO: Yes, Your Honor. And I believe what happened here, Your Honor, is that the County Attorney determined that the information he provided was not necessary for them to be able to proceed against the defendants in that case.

Two of the defendants, to my knowledge, have already been a part of the prison system in the past. And the fact -- simple fact of the matter remains that having rejected the use of his testimony, my client went ahead and entered into a new plea agreement and received no benefit from having given this free talk.

And, in fact -- simple fact of the matter is that the County Attorney, releasing him as a witness, disclosing that to the defendants in the on-going homicide case, Your Honor, is not an excusable act of neglect that can be overlooked by this Court.

The bottom line is that they used his testimony, and once having used it, they are honor bound and they are speaking -- the County Attorney is speaking for the State of Arizona, speaking for the County Attorney. They are honor bound to honor that agreement, and I haven't seen him yet, but his former counsel was also planning on being here this morning.

My client very clearly understood if he cooperated and they used his information that he was going to be given a walk. And nobody in their right mind facing prison would want to give a free talk and still face prison, having been disclosed as a witness, Your Honor.

Our prison system is -- it is a very brutal place. They cannot provide for his safety now that he has been disclosed as a witness.

They have got him in lock down where he will have to be until this Buckeye place opens up, and even the County Attorney's letters to me as of December 27th indicates, and I will offer this exhibit, that the final determination as to what classification and what placement of Mr. Burns is solely at the discretion of the Department of Corrections.

THE COURT: I think that is right.

MR. CARRASCO: And there is nothing that this Court can do to protect him. There is nothing the County Attorney can do to protect him, and there is nothing that the County Attorney can do to take back that disclosure. My client has now been disclosed in total.

It is rather interesting, I looked at the actual disclosure document and I think I supplied a copy of it. Not only does it give my client's address, it gives my client's parents' address, Mr. Burns, who's sitting here in the middle row. He has concerns about this as well.

I mean, how much protection can the State of Arizona give to my client and his son now that we have went along with this deal and had this thing blow up in our face? There is just simply no way you can take that back.

Even if Mr. Burns eventually is not used to testify, he has been disclosed, and there is no way you can keep the fact he has been in protective custody, so that he could ever be put back into general population.

And as such, all the case law is pretty adamant that the State must be held to its deal, and the only deal that was ever disclosed is if my client was going to be used -- was going to be disclosed, then he was entitled to a walk and that was the deal. And although -

THE COURT: Show me, please, where you have such a deal and I will be happy to consider it. Is it in this transcript?

MR. CARRASCO: No, sir, it is not in the transcript.

THE COURT: Is it in this Exhibit 1 to this hearing?

MR. CARRASCO: No, sir, it is not.

THE COURT: Where is it?

MR. CARRASCO: To that I would have to make a record. I would have to wait until Burt gets here, Mr. Rosales. He would testify as to what was discussed when he allowed his then client to go in and give this free talk.

THE COURT: I will be happy to give you the opportunity to get Mr. Rosales in here.

MR. CARRASCO: Okay.

THE COURT: We will take a recess.

MR. PERRY: At the same time, Your Honor, I am going to attempt to get Mr. Larson. Because while I am sure Mr. Carrasco is making this representation in good faith, that is not what occurred.

THE COURT: Very well. We will stand at recess until they show up.

(Whereupon, a recess was taken.)

THE COURT: Recall 98-06715, State of Arizona versus Aaron Scott Burns, informal conference re Petition for Post-Conviction Relief.

The record may reflect both counsel are present, also Mr. Larson from the County Attorney's Office, and Mr. Rosales.

The reason I was amenable to put what amounts to considerable delay, is because whatever I do, whichever way I rule is going to be either a petition for review or special action.

I wanted both of you gentlemen to make any record you wish, and I suppose we should swear Mr. Rosales and you may question him, counsel.

(Whereupon, Humberto Rosales is sworn by the clerk.)

THE COURT: Take this seat over here, please. Pull the microphone up. You may proceed, Mr. Carrasco.

MR. CARRASCO: Thank you, Your Honor.

HUMBERTO ROSALES,
called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARRASCO:

Q Please state your name.

A Humberto Rosales.

Q Okay. And you are a practicing attorney?

A I am.

Q How long have you been a practicing attorney?

A About 20 years.

Q And do you practice primarily in the area of criminal or civil cases?

A Criminal.

Q You have been practicing here in Maricopa County for how long?

A About that time, 20 years.

Q Were you formerly representing Aaron Scott Burns in the matter of State of Arizona versus Aaron Scott Burns?

A Yes, I did.

Q With regards to that case, did you ever have occasion to reach an understanding with the County Attorney about your client giving a free talk?

A I did.

Q Can you tell us, in general, what generally you do in terms of a free talk, how does that usually work?

A I tell the client basically what he can expect in terms of deals, promises. I tell him that initially the free talk is exactly that, it is a free talk. It is going to be discretionary with the County Attorney's Office.

Burns' case though was a bit different because it involved people who belonged, as I recall correctly, maybe to the Aryan Brotherhood. And part of the discussions I had with Aaron's family and with Aaron, and if I recall correctly Mr. Larson, the County

Attorney, there was a great concern on my part because the Aryan Brotherhood was in fact one of the organizations within the prison system that was very active in punishing people who would go against them.

I believe I shared with the family and Mr. Burns the fact that I had served as an arbitrator on a case where a man that was in protective custody was severely beaten by the members of the Aryan Brotherhood because he turned on one of their members.

Even though he was in protective custody, he was beaten severely. The testimony from the people at the prison described it as the worst beating in the history of the prison system, and they said that they did not know how this man had survived the beating.

I had discussed this with the family members. I discussed this with Aaron and that was a concern that I did voice to the County Attorney's office. Because I said, "I fear for him. If he is going to be in custody and his name is disclosed to the defense, there is no telling what could happen to him."

So that is my recollection of some of the discussions that I had. But, you know, with regard to specific deals, there were no specific deals, and obviously that was to keep the State's case pure. That is the way these things worked.

Q And would you ever counsel a client to agree to testify, if in fact that client was facing prison?

A There are times when the -- it is on a case to case thing.

There are times when the defendant knows he is going to have to serve some prison time because of a person's criminal history. Burns came to us with a minor criminal history, mostly misdemeanors and silly things.

So his case -- he was counseled to go forward, to be honest and to be truthful. Because I told him, you are pretty much assured a much, much better deal than what you are being offered now. So I did counsel him to -- in that regard to cooperate.

Q Do you think you counseled him in terms of that if his testimony was valuable to the County Attorney, he would possibly walk on the original charge that he was facing?

A I did.

Q And, in fact, was Mr. Burns -- he didn't have any prior felony record?

A That's correct.

Q And so when Mr. Burns entered into this deal to give a free talk, it was with the understanding and the belief that if the County Attorney used him, he would -- his own charges would be dismissed?

A I don't recall that that was discussed, but I did recall that the deal that he was -- that he had at the time was -- potentially would get better.

Q Have you ever had occasion, as has happened here, where somebody has declined to use your client in a free talk and then turned around and disclosed him as a prosecution witness?

A No. This is the first time I have seen this.

Q Are you familiar with any circumstances of any other case, perhaps talking to other attorneys in your 20 years?

A No.

Q Do you recall when this plea agreement --when the County Attorney declined to use Mr. Burns as a witness?

A I think it was in 1998, before we entered into the plea before this Court.

Q Okay. And the plea agreement that you entered into resulted in a sentence of seven years?

A That's correct.

Q For your client?

A That's correct.

Q And did that plea agreement and the fact that Aaron had given a free talk, did that have any impact on this agreement that -- the subsequent plea agreement that you entered into on behalf of Aaron?

A Sorry, I didn't understand that question.

Q Did Aaron get any benefit from having given that free talk?

A Oh, no, no.

Q The County Attorney didn't make a favorable recommendation to the Judge? Didn't do anything like that?

A Not that I recall.

THE COURT: The record may reflect he was given a mitigated term of seven years -

A That is correct.

THE COURT: -- which was recommended by Mr. Larson, I believe. Pardon the interruption. Go ahead.

BY MR. CARRASCO:

Q Did you understand clearly from the prosecutor that they were not going to use his testimony when you recommended that Aaron enter that plea agreement?

A Yes.

Q And had you contemplated that they were going to use his testimony, would you have recommended that plea agreement to Mr. Burns?

A Oh, no.

Q Do you have any understanding from the County Attorney's Office why they were not going to use the plea agreement -- or why they were not going to use Aaron's testimony?

A All I was told is that it was not useful information, so they were not going to use it.

MR. CARRASCO: That is all I have.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. PERRY:

Q Mr. Rosales, you practice in Federal Court quite a bit, don't you?

A Yes.

Q Have you looked at the agreement that was signed in this case? Did Mr. Carrasco, show it to you?

A Yes, he did.

Q And that is Exhibit 1?

A Correct.

Q Would it be fair to say that that is a lot briefer than other free talk agreements that you have seen?

A Yes.

Q Are you aware that under Brady versus Maryland, if there is anything that is discoverable, that still has to be disclosed?

A Oh, yes.

Q Do you know that -- do you normally advise your clients that that is the case before they enter into free talk agreements?

A I tell them that if there is something in writing -- that if there is something that is recorded, that is going to be disclosed. And if they are going to testify, that obviously the person's name is going to be disclosed, and I tell them when they enter the free talk, they know at that point that they will be presenting testimony before a trial. That is what I counsel them on.

Q Okay. Are you aware that -- have you looked at the transcript of the free talk today or recently?

A No.

Q There were two male defendants in the case. One was Larry Givens, who your client knew as Demetrius. One was Joseph Parker. Do those names ring bells with you vaguely?

A Vaguely, Jo-Jo and Demetri.

Q Right. I am going to show you -- Your Honor, do you have that as part of Mr. Carrasco's --

THE COURT: Yes. Page and line, please.

MR. PERRY: Yes.

Q First I am going to show you page five, about -- starting about line 7 and through line 19. I will ask you to read that to yourself.

A Okay.

Q Did your client basically say that Jo-Jo said for Mr. Givens not to talk to him?

A Just to be clear on this, I did not receive any of these copies. I was not present during the debriefing, and I did that purposely.

Q Okay.

A Just to keep that pure. So I am not aware of anything that you are showing me and I didn't hear it and I wasn't privy to it.

Q Okay. I can call Mr. Larson about that. The -- now, you advise all your clients and advised

Mr. Burns that what is going to happen is up to the County Attorney's Office; is that correct?

A That's correct.

Q And he had no deal from the County Attorney's of anything that you are showing me and I didn't hear it and I wasn't privy to it. Office that he would be walked on this case if he gave testimony; is that correct?

A That's correct.

Q And this was a deadly weapons, policy case, was it not?

A Yes.

Q And that would have had to have been approved by -- Judge knows this, maybe Mr. Carrasco does not -- a supervisor?

A Yes.

Q And the victims would also have to be involved and give at least some input into the decision making?

A Right.

Q Where did you get information that the defendants in this case were involved with the Aryan Brotherhood?

A From my client.

Q Didn't your client -- was that the two male defendants?

A That's correct.

Q Do you know any members of the Aryan Brotherhood that are black?

A I don't.

Q Are you aware that both Mr. Parker and Mr. Givens are black?

A I wasn't aware of anything, sir. I am telling you I wasn't privy to that.

Q Okay. So -- okay. You testified earlier when -- on direct examination that you would not have recommended the plea if you knew this was going to be disclosed, correct?

A If I remember correctly, I would not have recommended that he go through -- if it was a situation where he would testify and do the deal, no, I wouldn't recommend that.

Q You wouldn't recommend a seven year deal if he were going to testify?

A Right.

Q But in fact your situation would have been if they made you that sort of an offer, you still would have had to go to trial, right, and if he had gone to trial and lost, it would have been mandatory prison, correct?

A Right.

Q Who did you talk to when this free talk was done from the County Attorney's Office?

A Again, I wasn't privy, you know. I allowed Mr. Burns to participate in the free talk. I wasn't present. I told him I wouldn't be present. I gave my reasons for not being present.

Q Who did you talk to from the County Attorney's Office, though?

A If I remember correctly, it may have been Mr. Larson.

Q Did you ever talk to Mr. Imbordino about this?

A The only time I spoke to some other counsel is when I was approached and told that Burns had been noticed as a witness and had been subpoenaed as a witness, and I think that may have been Mr. Heilman.

Q So you never talked to Mr. Imbordino?

A You know, I do recall there is something in my background that I did have a conversation with him in passing, but I don't recall what it was.

Q You never negotiated with Mr. Imbordino?

A No.

MR. PERRY: No other questions.

THE COURT: Redirect.

MR. CARRASCO: Thank you.

REDIRECT EXAMINATION

BY MR. CARRASCO:

Q It was your impression when you advised your client to give this free talk that potentially he could walk because of this charge -- because of the information he had?

A There was that potential because he was telling me that it was quite strong. It was quite specific. Because I told him, "if you don't have specific information, don't volunteer it."

Q Okay. And the County Attorney did, in fact, at some point after the free talk, tell you they were not going to use your client Mr. --

A That's correct.

Q And at that time-you entered into a plea agreement with the State on the underlying charge against Mr. Burns?

A Yes.

Q With the belief and under the belief that your client would not have to testify against these other defendants?

A Correct.

Q And all that was done somewhere around

May of '98?

A I believe so, yes.

Q Did anybody from the County Attorney's Office contact you sometime in October of '99 about your client testifying?

A Yes, I did receive a letter.

Q Okay. And do you know -

MR. CARRASCO: If I may approach the witness, Your Honor?

A It may have been from Mr. Heilman, if I remember correctly, because I do recall calling him up on the phone and, you know, asking him what this was all about. I said, it stinks.

I said, first you say you are not going to use him, and now I am receiving this letter. You are actually disclosing him at this point. So I do remember that conversation.

Q I am going to show you what has been marked as Exhibit Number 2, and I ask you if you have seen this letter before.

A Yes, I have.

Q And now, other than the scribbling on it, that is the letter that you would have received perhaps from my office?

A Yes. It is marked Exhibit 2. It is a letter to Aaron Burns from Mr. Quihuis of the homicide bureau of the County Attorney's Office.

Q Would you read that letter, the body of that letter?

A I am the legal assistant working with the Deputy County Attorney who is prosecuting the defendant in the above entitled case -- the reference is to State versus Caliri, Parker and Givens.

This case involves the crime of murder, which occurred July 20, 1998. You are listed as a witness the State intends to call in this case. As such, the defendants attorney has a right to interview you before trial. Because either the County Attorney or I want to be present whenever you discuss the case with the defense attorney or their representative, the interview will be held in our office.

Please call me at 506-7920 so that I can schedule a time for this interview. Should you receive an interview request from the defense attorney or their representative, you may tell the person to contact me.

Please remember that any person who tells you that he or she is an employee of Maricopa County may work for the Public Defender's Office or the prosecutors office. And it is signed Philip Quihuis, legal assistant with the homicide bureau, Maricopa County Attorney's office.

Q Does that letter in any way or shape indicate that Mr. Burns has information that is of benefit to any of the defendants in the case?

A No.

Q Did Mr. Heilman ever tell you he was disclosing Mr. Burns as a witness because he had testimony that had to be disclosed under any Constitutional principles?

A No.

Q What is the date of that letter?

A It is dated October 5th, 1999.

Q And the letter is addressed to whom?

A Aaron Burns.

Q The address, is it at the prison?

A No, it is 8531 East Amethyst, A-m-e-t-h-y-s-t, Tucson, Arizona.

Q And was that Mr.-Burns, address before he went to prison?

A I believe it was one of his addresses, either mother or father. Father's, I believe.

MR. CARRASCO: Your Honor, I would like to offer this into evidence. It has some scribbles that have -- which is just phone calls and stuff that I scribbled on, but it is basically the letter my client received.

MR. PERRY: No objection.

THE COURT: 2 is received for the purpose of this hearing.

BY MR. CARRASCO:

Q When your client, Mr. Burns, gave the free talk, do you recall about when that free talk was?

A '98. 1 can't remember the specific time frame, but it may have been during the summer months.

Q Okay. September 16th of 98?

A That is very close.

Q Would that be about right? Do you know how long after that free talk when you were told they were not going to use Mr. Burns as a witness?

A It may have been some months afterward. It wasn't right away. It was some months afterwards.

Q I want to show you what has been marked as Defendant's Exhibit 3, and I ask you to refer to the time of that report. Do you recognize that report or --

A I saw a copy of this this morning. It is dated 2-13-99, time in the report was 1303. The DR number is 81213834143, and the person is Phoenix police officer Carl Caruso who prepared it.

Q Is Mr. Caruso the one that conducted the interview with Aaron back in 198?

A I believe so. I believe that person was present or may have been present.

MR. PERRY: Your Honor, we will stipulate that he was.

BY MR. CARRASCO:

Q And the interview he conducted with Aaron, the free talk was done with your consent and after you had advised Mr. Burns of the possible benefit of giving that free talk?

A That's correct.

Q Now, this report is prepared after this Exhibit 3 was prepared, after Mr. Burns had been informed he was not going to be used as a witness?

A I think it is dated 1999, so it is prepared way afterwards.

MR. CARRASCO: I am going to offer Exhibit 3.

MR. PERRY: I would like to look at it first, Your Honor.

No objection.

THE COURT: 3 is received for the purpose of this hearing.

MR. CARRASCO: No other redirect, Your Honor.

THE COURT: There are issues that you had not raised on cross. Do you wish any further cross?

MR. PERRY: No, Your Honor.

THE COURT: Thank you. You may step down.

THE WITNESS: Am I excused, Your Honor?

THE COURT: Any objection?

MR. PERRY: No objection.

THE COURT: You are excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: I am curious to know why this supplement was prepared apparently on February 13, 1999, when the interview was conducted on September 16, 1998.

MR. PERRY: I don't know, Your Honor. I wasn't the prosecutor at the time. I didn't have -- I didn't know it was going to be introduced until he showed it in court today. It certainly is in the disclosure that I have.

THE COURT: All right. Let's hear what Mr. Larson has to say.

(Whereupon, Daniel J. Larson is sworn by the clerk.)

DANIEL J. LARSON,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PERRY:

Q State your name, please.

A Daniel J. Larson.

Q Where are you employed?

A Maricopa County Attorney's Office.

Q What is your current assignment?

A Gang/Rop unit.

Q What was your assignment in September of '98?

A Trial bureau D.

Q And were you the assigned prosecutor in Aaron Scott Burns?

A Yes.

Q Were you that basically throughout the whole case, after you got it from charging?

A Yes, I was.

Q Did you, along with Vince Imbordino, do a free talk with Aaron Burns?

A Yes, we did.

Q Was there an agreement that was signed by Mr. Rosales?

A Yes.

MR. PERRY: Your Honor, may I have Exhibit 1 for a moment?

THE COURT: You may.

BY MR. PERRY:

Q Is that a copy of the agreement?

A Yes.

Q Who prepared that?

A I did.

Q Did -- were there any agreements other than what was in the written agreement?

A No, there were no agreements at all.

Q Did you talk to -- did Mr. Rosales talk to Mr. Imbordino, that you knew of?

A I believe at one time after the free talk Mr. Rosales asked me what was the status of the information provided by Mr. Burns. And I said, "that is not my investigation. You will have to speak to Mr. Imbordino."

Whether he did or not after that conversation, I don't know.

Q I have asked you to read previous, some portions of the transcript, particularly page five. Have you looked at that today?

A Yes, I did.

Q And is there a statement from -- who was present during the free talk?

A It was myself, Mr. Imbordino, Mr. Burns,

and a detective whose name I don't recall.
Can you look at the transcript? Does that refresh your recollection?

A I don't recall what his name was, but I have no reason to believe that is not the person.
Would that be Detective Caruso?

A Correct.

Q Did the defendant make any statements or did Mr. Burns make any statements about what Jo-Jo was saying during a phone conversation?

A He did say that Jo-Jo said several things, but Jo-Jo isn't specifically on the phone. He was talking in the background.

Q Did he specifically say for Larry Givens not to talk to Mr. Burns?

A I believe so, yes.

Q Now, did he also say what race Jo-Jo was?

A Did Mr. Burns say?

Q Yeah.

A I would have to say no, because I never knew anything about the defendants Larry or Jo-Jo.

Q I am going to ask you to look at page six -page five, starting at line 26 through page six, line five.

A It appears during the free talk that he did say he was black.

Q Okay. Mr. Larson, did Mr. Burns get any consideration for doing the free talk from you?

A I would have to say, yes, he did, although I never made that known to his defense attorney.

Q Did the fact that he had talked influence you as to what you made as an offer?

A Yes, it did.

Q Was that positive for him or negative?

A It was positive for him.

Q Did it also affect your recommendation to Judge D'Angelo?

A Yes, it did. I was concerned that Judge D'Angelo wasn't going to go along with the stipulations in the plea agreement.

Q Would -- if the free talk had been helpful to Mr. Imbordino and a plea other than to prison would have been considered by him, who would have had to approve that?

A Well, the first decision would have been mine, and I never would have considered an offer other than prison for Mr. Burns.

Q And if -- assuming that you had that consideration and decided to go further, who would have had to do the final approval?

A Jim Blake.

Q Was he your division director at the time?

A That's correct.

Q And was this a deadly weapons' policy case?

A Yes, it was.

MR. PERRY: No other questions.

THE COURT: Cross-examine.

MR. CARRASCO: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. CARRASCO:

Q Have you had an opportunity this morning, Mr. Larson, to review the Exhibit Number 1, which was a letter of September 14th, 98?

A Is that the copy of the free talk agreement?

Q Yes, sir.

THE COURT: Exhibit 1?

A Yes, I had a chance to look at that.

BY MR. CARRASCO:

Q You in fact signed that agreement?

A Yes, I did.

Q And this information that Aaron had about three homicide defendants, this was information on a case that was not your case; is that correct?

A That's right.

Q So as to whether to use his testimony or not use his testimony, you had no say so in that, did you?

A I was consulted, but the first information we wanted from him was from the detective investigating the case.

Q Okay. But, in fact, if Mr. Imbordino, decided to use Mr. Burns or not use him, it was Mr. Imbordino's call, not your call?

A That's correct.

Q Although he might consult with you, it was his call?

A That's correct.

Q And do you recall if Mr. Imbordino did in fact advise you that he was not going to use Mr. Burns?

A The detective was trying to corroborate the statements given by Mr. Burns during the free talk. Because my conversations with Mr. Imbordino was that they weren't interested in evidence against -- and I only knew the defendants as Larry and Jo-Jo, and I didn't know at the time there was a third defendant.

But they weren't interested in testimony against Larry. They were interested in testimony against Jo-Jo, and you -- if you read the transcript of the free talk, you notice that Jo-Jo wasn't apparently present during the phone conversation and only a partial participant, because he was never directly on the phone with Mr. Burns.

So it was my understanding that the detective was trying to corroborate whether Jo-Jo was actually there during that phone conversation. Because Mr. Burns said, although he recognized his voice, that he had only talked to him a couple of times before that. So we were waiting for the detective to corroborate Mr. Burns' statements.

Q So, in fact, the -- your understanding is that Mr. Burns' testimony was not going to be used because he was primarily needed against Jo-jo and not against Demetrius?

A I was never told that his statements were not going to be used, and I never told Mr. Rosales that his statements were not going to be used.

I maintained after several months of not hearing back from Mr. Imbordino or the detective, that I was under the understanding that his statements had not been corrooborated and that I was going to go forward with this case. That is what I had told Mr. Rosales.

Q And in fact, when -- when Mr. Burns pled on this seven years, and he pled to the charge basically, there is nothing in the plea agreement that said we are giving you any credit because you gave this free talk?

A That's correct.

Q And there was no -- nothing in the pretrial or the presentence report that said, Judge, go easy on this guy because he cooperated with us on the homicide case?

A That's correct.

Q And there was nothing to tell Mr. Burns that he pled guilty, that he was going to be disclosed as a witness?

A That's correct.

MR. CARRASCO: If I may approach the witness?

THE COURT: You may.

BY MR. CARRASCO:

Q Can I see Exhibits 2 and 3? First off, with regard to Exhibit 1, you already talked about it, on this second page there appears to be a signature. Does that appear to be your signature?

A Yes.

THE COURT: I think this is already in?

THE CLERK: Yes.

BY MR. CARRASCO:

Q With regard to Exhibit 2, if you want to take a minute to look at that letter to see if you recognize the caption.

A I do not.

Q Okay. This State versus Caliri, Parker and Givens, CR98-11372, that is not a case that you were prosecuting; is that correct?

A That's correct.

Q Mr. Imbordino, and then later Mr. Heilman?

A From my understanding, yes.

Q And do you have a Philip Quihuis in

your office?

A I've never seen Mr. Quihuis, name before. I don't know.

MR. PERRY: We will stipulate he was a legal assistant. He was assigned to Mr. Heilman and was assigned this case. If Mr. Carrasco wants that stipulation?

MR. CARRASCO: Thank you, I do.

THE COURT: All right.

BY MR. CARRASCO:

Q Okay. And with regard to your prosecution of Aaron, I want to show you Exhibit Number 3. Carl Caruso, is that the detective -- same detective who is referred to in the transcript of the free talk?

A I've never seen this supplement before. I didn't recall the detective's name until Mr. Perry had showed it to me on the transcript, but according to the transcript, it is the same person.

Q Okay.

MR. CARRASCO: That is all I have of this witness, Your Honor.

THE COURT: Redirect.

MR. PERRY: None, Your Honor.

THE COURT: All right.

MR. PERRY: Your Honor, I do have sort of an additional piece of evidence. I think I have proven through the --

THE COURT: Just a minute. Do you know why this supplement was prepared long after the interview?

THE WITNESS: I have no idea, Judge.

THE COURT: Thank you. You may step down.

MR. PERRY: I think we have proven through the transcript that Mr. Parker is black, Mr. Givens is also black. I am somewhat baffled by all this Aryan Brotherhood reference, because there is nothing in this case having to do with that.

I can ask the Court to take judicial notice of the file in that case and it has the warrant information that shows he is black -- or Mr. Carrasco could accept my avowal that I have seen him and he is black. But my concern is the testimony by Mr. Rosales about the Aryan Brotherhood. Basically we have black defendants. It is a complete non sequitur.

MR. CARRASCO: By way of -- I agree that Mr. Rosales is obviously confused. There is reference in the transcript to some gang affiliations, but obviously Mr. Rosales referred to the wrong gang.

I don't believe it is Aryan Brotherhood, but other gang affiliations by one or more of the two male defendants in the homicide case. And I can find the cites in there, but there is some talk about gang affiliations, but not the Aryan Brotherhood gang, but different gangs. I think that was just a simple error on Mr. Rosales' part.

THE COURT: All right. Anything else?

MR. PERRY: No, Your Honor.

THE COURT: Either side wish to make any further record?

MR. PERRY: I do not, Your Honor.

THE COURT: Okay.

MR. CARRASCO: I didn't know -- I released my witness earlier. I had Mr. Sloss, S-l-o-s-s here.

THE COURT: I am not interested in what the Department of Corrections does. There is nothing I can do about it.

MR. CARRASCO: Well, I think that is -- I think that is the point I was trying to make is the Department of Corrections can't help us here.

THE COURT: All right.

MR. CARRASCO: I have nothing additional on the record then.

THE COURT: Thank you.

The -- it is obvious that the situation that has arisen is unfair to Mr. Burns, however, does unfairness rise to the height of finding a determination that his rights were violated to the extent that I should grant the Petition for Post-Conviction Relief.

The Exhibit 1 specifically reserved to the County Attorney's Office absolute discretion on whether to use his testimony or not.

Can I see it again, please?

THE CLERK: Yes.

THE COURT: The unfairness arises from the fact that he was told through his attorney that he was -- his testimony would not be used and he therefore entered the plea agreement in this cause number, 98-06715.

I am therefore going to summarily dismiss your Petition for Post-Conviction Relief. You have 30 days in which to file a Petition for Review. Thank you, gentlemen.

MR. CARRASCO: Thank you, Your Honor.

MR. PERRY: Thank you, Your Honor.

(Whereupon, the proceedings concluded.)

I, ELVA CRUZ-LAUER, having been first duly sworn and appointed as Official Court Reporter herein, do hereby certify that the foregoing pages numbered from 2 to 42, inclusive, constitute a full, true and accurate transcript of all the proceedings had in the above matter, all done to the best of my skill and ability.

DATED this 6th day of January, 2000.

I, ELVA CRUZ-LAUER, having been first duly sworn and appointed as Official Court Reporter herein, do hereby certify that the foregoing pages numbered from 2 to 42, inclusive, constitute a full, true and accurate transcript of all the proceedings had in the above matter, al 1 done to the best of my skill and ability. DATED this 6th day of January, 2000

APPENDIX Q

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,)
Plaintiff,)
)
vs.) CR98-06715
)
AARON SCOTT BURNS,)
Defendant.)
)

Phoenix, Arizona
December 21, 1999
8:30 o'clock a.m.

BEFORE: The Honorable Peter T. D'Angelo, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Informal Conference)

REPORTED BY: ELVA CRUZ-LAUER, RPR

INDEX

INFORMAL CONFERENCE

EXHIBITS

STATE'S EXHIBIT:

		Page
Exhibit 1	(Copy of letter dated 9-14-98)	9

APPEARANCES:

For the State:	MR. WILLIAM PERRY, Deputy County Attorney,
For the Defendant:	MR. LOUIE CARRASCO, Attorney at Law

Phoenix, Arizona
December 21, 1999
8:30 o'clock a.m.

(ELVA CRUZ-LAUER was duly sworn to act as the Official Court Reporter herein.)

(Whereupon, the following proceedings were held in chambers.)

THE COURT: 98-06715, State of Arizona versus Aaron Scott Burns. Informal conference re Petition for Post-Conviction Relief.

MR. PERRY: William Perry for the State.

MR. CARRASCO: Lou Carrasco on behalf of the defendant.

THE COURT: Mr. Carrasco, you speak of an initial plea agreement.

MR. CARRASCO: Yes, sir.

THE COURT: That is oral?

MR. CARRASCO: Yes, sir.

THE COURT: Not written?

MR. CARRASCO: Correct.

MR. PERRY: There is a written agreement actually, Your Honor, but it is not a plea agreement and I have it with me.

THE COURT: May I see it, please?

MR. PERRY: Sure. It is not as detailed a free talk agreement as the ones that I do. Let me show it to counsel, first.

THE COURT: All right. I am going to make a copy of this for the record.

MR. PERRY: Thank you, Your Honor.

MR. CARRASCO: Could I impose on you for a copy as well?

THE COURT: Certainly. All right. If I understand the scenario here, there has been three prosecutors. The first one says, I am not going to use him. The second one puts him on the witness list -

MR. PERRY: and discloses his statement.

THE COURT: and discloses the statements to the defendants in the murder case. Then you are the third prosecutor?

MR. PERRY: Yes, sir.

THE COURT: And you determined you don't want to use him as a witness?

MR. PERRY: Correct. Now, I have done something that I eluded to in my response, and that is that I have made contact with the Department of Corrections to get him housed in a way so he won't be continuously locked down and will be as protected as he can be. That hasn't reached fruition yet.

But I think I will be able to be successful in getting him somewhere where he won't have to be locked down for the rest of his sentence, and he, you know, will be protected at least to the degree that they can protect him.

As you know, Your Honor, it is never 100 percent, and I will tell you that he was also listed in the DR's for something that he reported on this defendant -- on the defendant, who is really the one in question, who is Mr. Givens. That was entirely separate and apart from the free talk, but as -- not as to the murder. It was as to a different case.

THE COURT: Well, the issue would be then, as I see it, whether that initial document is a plea agreement or at least contractually binding on the State. It is not obviously a formal written plea agreement.

MR. PERRY: Your Honor, I did not get the fax that Mr. Carrasco sent to me. I don't know if it got lost in our office. I have a copy of it now, of his response.

My suggestion would be that I be allowed to read his cases and we come back, argue it, and if the defendant wants to be present and wants to be transported for that, that we have -- I don't think there is any question as to facts.

I think we are agreed as to the facts, but I think that, although not in most cases, I think that in this case, because it is sort of a unique issue, that I think that it might be worthwhile to have a formal oral argument.

THE COURT: All right. As soon as the bailiff gets back with the copies.

MR. CARRASCO: If we can have that as soon as possible. I have been working on this since about October 5th, and all I can get out of the Department of Corrections is, well, we will keep him locked down until we hear different.

But even in their lock-down system in the unit, he is at the Yuma State Prison, they have a shanking or a beating like every other week. So I don't think they can provide any kind of real protection for him.

And I think that the ultimate disposition of this Court will be to conclude that since a deal was made, and since the information was used, that this Court will have no alternative but to impose the sanction of saying, well, a deal is a deal and you have to live by it, even though you -- even though you did not intend to use the material, you have in fact used it. So once it is used, I think that they are bound.

THE COURT: All right. That is -- that is the part that seems to be rather unfair, insofar as the defendant is concerned. They did in fact use the information that he provided.

And if this, Mr. Carrasco's information is correct, the disclosure of the testimony foreclosed defenses which the murder conspirators might have offered. So there appears to be quid pro quo.

MR. PERRY: Your Honor, I also -

THE COURT: I don't know what the remedy is. I got a little problem.

MR. CARRASCO: It is specific performance. It is harsh, but it is the State -- that is the State -- has to be held --

THE COURT: Well, this agreement, by the way, for the record, dated September 14, 1998, 1 am going to make it part of the record signed by Vince Imbordino for Daniel Larson. Apparently it is Daniel Larson on behalf of the State, Humberto Rosales on behalf of the defendant, and is signed by the defendant.

What it says is that in part, the defendant is not entitled at this juncture to any specific consideration regarding the charges against him just because the has given to the prosecution such a statement.

Second full paragraph. Such consideration, if any at all, will be unilaterally determined by the Maricopa County Attorney's Office only after a statement is made.

All right. So then you tell me, Mr. Perry, when you will be ready to argue this thing?

MR. PERRY: Well, I need to know two things. I need to know if Mr. Carrasco wants to have his client transported for this, because it will take an amount of time for the transport order. That is the only time I would need. I suspect that is a couple of weeks.

I also -- you remember Steven Lynch used to be in our gang/rop unit? I think he appeared in your court. He is now the general counsel for the Department of Corrections, and I have spoken to Mr. Lynch about attempting to get Mr. Burns to a new unit that they have that is a totally protective custody unit where he would not be locked down and would be safer.

And I would like to have a chance to explore that, but I am thinking that we can do this the first week in January. Assuming that he can be transported that soon if Mr. Carrasco wants him transported.

MR. CARRASCO: I would waive his presence to get a hearing as soon as humanly possible.

THE COURT: All right. We have a vacation coming up next week. I won't be back until the 4th of January.

MR. PERRY: That is actually the best day that week.

THE COURT: Tuesday the 4th?

MR. CARRASCO: Yes, sir.

THE COURT: The clerk will make this letter, agreement -- calling it a letter agreement dated December 14, 1998, part of the record in this case. We will continue the informal conference to 8:30 o'clock a.m., Tuesday, January 4th. That way the defendant need not be present, as long as he is represented by counsel.

I may have to let the appellate courts determine this thing, Mr. Carrasco. I --

MR. CARRASCO: How about --

THE COURT: I am not prejudging it, but I feel uncomfortable calling that document -- apparently you weren't even aware of this; is that correct? You weren't aware of this?

MR. CARRASCO: I didn't have that document in my file, no, Your Honor, but it doesn't change anything that I have said or alleged in my petition.

THE COURT: All right. Okay. Well, then we will see you on the 4th at 8:30.

MR. CARRASCO: Thank you, your Honor.

MR. PERRY: Thank you, Your Honor.

(Whereupon, the proceedings concluded.)

I, ELVA CRUZ-LAUER, having been first duly sworn and appointed as Official Court Reporter herein, do hereby certify that the foregoing pages numbered from 2 to 10, inclusive, constitute a full, true and accurate transcript of all the proceedings had in the above matter, all done to the best of my skill and ability.

DATED this 6th day of January, 2000.

APPENDIX R

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. AARON SCOTT BURNS, Defendant.	)	NO. CR-1998-006715 MEMORANDUM OF POINTS AND AUTHORITIES

(Assigned to Judge Peter T. D'Angelo)

Petitioner, Aaron S. Burns, while under indictment for a drive-by shooting learned of a conspiracy to commit murder. That homicide eventually occurred.

Petitioner offered the prosecutor a "free-talk" regarding the information he possessed and was assured that if his information proved useful, the prosecutor would dismiss the charges against him, in exchange for said information.

Relying on this plea bargain ("the initial plea agreement"), Petitioner presented himself for the "free-talk" and provided detailed information regarding the homicide and the conspirators therein. Thereafter, the prosecutor declined to use Petitioner's testimony and Petitioner entered into a second, entirely separate plea bargain ("the second plea agreement") which gave no consideration for Petitioner's "free-talk".

On October 5, 1999, the prosecutor disclosed to the homicide Defendants that Petitioner was to be used as a witness against them. The prosecutor also disclosed a summary of the testimony provided by Petitioner, thereby foreclosing many defenses which the conspirators might have offered. The prosecutor thus used Petitioner's testimony for exactly the purpose intended when Petitioner entered into the initial plea agreement. The Petitioner, however, has been denied the benefit of that bargain -- the charges against him were not dismissed; instead he is serving a seven year sentence in the Yuma Prison, Dakota unit, where he is now known as an informant.

A plea agreement is like a contract between the State and the defendant and is subject to contract interpretation. See Mejia v. Irwin 289 Ariz. Adv. Rep.

3, 987 P.2d 756 (App. 1999); United States v. Lewis, 979 F.2d 1372 (9th Cir. 1992); State v. Taylor, 158 Ariz. 561, 563-64, 764 P.2d 46, 48-49 (App. 1988).

Specific performance is a contract remedy for breached plea agreements because those agreements are contractual in nature. See Hovey v. Superior Court of Arizona, 165 Ariz. 278, 798 P.2d 416, (App. 1990); United States v. Packwood, 687 F.Supp. 471 (N.D.Cal.1987). Specific performance, as an equitable remedy, is available where the remedy at law is inadequate. Dobbs, Remedies Sec. 2.5 (1973). A contractual remedy is adequate if it places the non-breaching party in as good a legal position as that party would have enjoyed had the contract been performed. Dobbs, id. at Sec. 12.1.

The Petitioner performed all of the conditions of the initial plea agreement. The government has received the substance of the reasonably expected benefit of its bargain -- it has used Petitioner's testimony and disclosed him as an informant. The government, however, has not fulfilled its obligation of reciprocal performance -- it did not dismiss the charges against Petitioner as it was required to do under the initial plea agreement.

Petitioner was not only denied the benefit of his plea bargain, he has ben placed in a worse position, since he is now a known informant who is incarcerated with numerous hard core long term offenders. Specific performance provides the only appropriate relief under these circumstances. See also State v. Taylor, 158 Ariz. 561, 764 P.2d 46, (App. 1988) ("A court must give effect to the contract as it is written, and the terms or provisions of the contract, where clear and unambiguous, are conclusive... Any dispute over the terms of the plea agreement will be determined by objective standards"(citations and brackets omitted)).

The Ninth Circuit has followed traditional contract principles in looking toward the reasonable expectations of the parties at the time of contracting to discover whether a given breach has deprived them of the benefit of their bargain. See United States v. Packwood, supra, citing United States v. Kamer, 781 F.2d at 1387-9; United States v. Arnett, 628 F.2d at 1164. When the prosecutor declined to use Petitioner's testimony and Petitioner entered into the second plea agreement, Petitioner reasonably expected that his testimony would be neither used nor disclosed to the murder Defendants. See State v. Ross, 166 Ariz. 579, 804 P.2d 112 (Ct. App. 1990) ("A breach of a plea agreement occurs not only when the state directly breaks its promise, but also when the spirit of the inducement, reasonably inferred from the written agreement, is breached.")

It is an essential component of fundamental fairness that, when a defendant and the state enter into a particular agreement, the state must comply with its promises. State v. Ross, supra. Where the state violates a plea agreement and withdrawal from it would be an inadequate remedy, the trial court must specifically enforce the original plea agreement. Hovey v. Superior Court ex rel. County of Maricopa, 165 Ariz. 278, 798 P.2d 416 (Ct. App. 1990).

The State contends that their actions here are merely a harmless error, and despite having already used Petitioner's "free-talk" to full advantage, they now claim that they can repair their "error" merely by asserting that they will not require Petitioner's testimony at the homicide trial. This does nothing to mitigate the State's disclosure and use of Petitioner's testimony and does not place the Petitioner "in as good a legal position as that party would have enjoyed had the contract been performed" (see Hovey v. Superior Court, supra). Instead, "to allow the state to change its mind in these circumstances comports neither with ordinary contract principles nor with the more expansive notions of fundamental fairness that control the relations between a state and its citizens" (see State v. Platt, 162 Ariz. 414, 783 P.2d 1206, (App. 1989)).

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APPENDIX S

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. AARON SCOTT BURNS, Defendant.	NO. CR-1998-006715 PETITION FOR POST-CONVICTION RELIEF

(Assigned to Judge Peter T. D'Angelo)

Instructions: In order for this petition to receive consideration by the Court, each applicable question must be answered fully but concisely in legible handwriting or by typing. When necessary, an answer to a particular question may be completed on the reverse side of the page or on an additional blank page, making clear to which question such continued answer refers.

Any false statement of fact made and sworn to under oath in this petition could serve as the basis for prosecution and conviction for perjury. Therefore, exercise care to assure that all answers are true and correct.

A person unable to pay costs of this proceeding and to obtain services of counsel without incurring substantial hardship to himself or his family should complete the Affidavit of Indigency and Request for Appointed Counsel attached to this petition.

NO ISSUE WHICH HAS ALREADY BEEN RAISED AND DECIDED ON APPEAL OR IN A PREVIOUS PETITION MAY BE USED AS A BASIS FOR THIS PETITION.

TAKE CARE TO INCLUDE EVERY GROUND FOR RELIEF WHICH IS KNOWN AND WHICH HAS NOT BEEN RAISED AND DECIDED PREVIOUSLY, SINCE FAILURE TO RAISE ANY SUCH GROUND IN THIS PETITION WILL BAR ITS BEING RAISED LATER.

When the petition is complete, mail it to the Clerk of the Superior Court of Maricopa County.

1. Petitioner's Name: Aaron Scott Burns

Petitioner's prison number (if any): 145100

2. Petitioner is now:

(A) On Parole

(B) On Probation

(C) X Confined in the Arizona State Prison, Dakota Unit at Yuma, Az.

3. (A) Petitioner was convicted of the following crimes:

Drive-by Shooting

(B) Petitioner was sentenced on June 17, 1999 to a term of 7 years. Defendant was given credit for 5 days time served.

Defendant's sentence commenced on June 17, 1999 following a:

Trial by Jury

Trial by a Judge without a Jury

X Plea of Guilty

Plea of No Contest

in the Superior Court for Maricopa County with Judge Peter T. D'Angelo presiding.

(C) The file number of the case was CR1998-006715

4. Petitioner is eligible for relief because of:

The introduction at trial of evidence obtained pursuant to an unlawful arrest.

The introduction at trial of evidence obtained by an unconstitutional search and seizure.

The introduction at trial of an identification obtained in violation of constitutional rights.

The introduction at trial of a coerced confession.

The introduction at trial of a statement obtained in the absence of a lawyer at a time when representation is constitutionally required.

Any other infringement of the right against self-incrimination.

The denial of the constitutional right to representation by a competent lawyer at every critical stage of the proceeding.

The unconstitutional suppression of evidence by the state.

The unconstitutional use by the state of perjured testimony.

An unlawfully induced plea of guilty or no contest.

Violation of the right not to be placed twice in jeopardy for the same offense.

The abridgement of any other right guaranteed by the constitution or the laws of this state, or the constitution of the United States including a right that was not recognized as existing at the time of the trial if retrospective application of that right is required.

X The existence of newly-discovered material which requires the court to vacate the conviction or sentence.

(Specify when petitioner learned of these facts for the first time, and show how they would have affected the trial.)

Petitioner was promised that if he cooperated with the Maricopa County Attorney on another pending criminal matter he would not be prosecuted.

After providing the promised cooperation he was informed that the information was "useless" and his own prosecution continued on.

Petitioner has now been informed that the prosecution intends to use his testimony.

The lack of jurisdiction of the court which entered the conviction or sentence.

The use by the state in determining sentence of a prior conviction obtained in violation of the United States or Arizona constitutions.

Sentence imposed other than in accordance with the sentencing procedures established by rule and statute.

Being held beyond the term of sentence or after parole or probation has been unlawfully revoked.

The failure of the judge at sentencing to advise petitioner of his right to appeal and the procedures for doing so.

The failure of petitioner's attorney to file a timely notice of appeal after being instructed to do so.

The obstruction by state officials of the right to appeal.

Any other ground within the scope of Rule 32 of the Arizona Rules of Criminal Procedure (please specify).

5. The facts in support of the alleged error(s) upon which this petition is based are contained in Attachment A. (State facts clearly and fully; citations or discussions of authorities need not be included).

6. Supporting Exhibits:

(A) The following exhibits are attached in support of the petition:

Affidavits (Exhibit(s) #)
Records (Exhibit(s) #)
Other supporting evidence

(B) No affidavits, records or other supporting evidence are attached because: N/A

7. Petitioner has taken the following actions to secure relief from his convictions or sentences:

(A) Direct Appeal: Yes X No (If yes, name the courts to which appeals were taken, dates, numbers, and results.)

(B) Previous Rule 32 Proceedings: Yes X No (If yes, name the courts in which such petitions were filed, dates, numbers, and results, including all appeals from decisions on such petitions.)

(C) Previous Habeas Corpus or Special Action Proceedings in the Courts of Arizona: ___ Yes X No (If yes, name the courts in which such petitions were filed, dates, numbers, and results, including all appeals from decisions on such petitions.)

(D) Habeas Corpus or Other Petitions in Federal Courts: ___ Yes X No (If yes, name the districts in which petitions were filed, dates, court numbers -- civil action or miscellaneous, and results, including all appeals from decisions on such petitions.)

8. Petitioner was represented by the following lawyers at (place name of counsel in the blank and his address, if known):

Arraignment and plea: Humberto B. Rosales
1001 North Central Suite 660
Phoenix, Arizona 85004-1961

Sentencing: Humberto B. Rosales

Preparation, presentation, or consideration of any previous petitions or motions for post-conviction relief filed in connection with this conviction: N/A

The issues which are raised in this petition have not been finally decided nor raised before because (state facts):

This issue could not have been raised on direct appeal because the newly discovered evidence was not known at the time available for appeal.

10. Because of the foregoing reasons, the relief which the petitioner desires is:

(A) X Release from custody and discharge

(B) A new trial

(C) Correction of sentence

(D) The right to file a delayed appeal

(E) Other relief (specify): Resentencing with new presentence report.

11. Petitioner is presently represented by counsel X Yes No. If yes, provide his name and address.

Louie Carrasco
P.O. Box 2243
Tucson, AZ 85705

If no, does the petitioner request the court to appoint counsel to represent him in this proceeding? Yes No

I swear or affirm that this petition includes all the claims and grounds for post-conviction relief that are known to me, that I understand that no further petitions concerning this conviction may be filed on any ground of which I am aware but do not raise at this time, and that the information contained in this form and in any attachments is true to the best of my knowledge or belief.

LOUIE CARRASCO
Attorney for Petitioner

Copies of the foregoing mailed this

day of October, 1999 to:

Joseph B. Heilman/Daniel J. Larson
Deputy County Attorney
301 W. Jefferson 8th Floor
Phoenix, AZ 85003-2191
Attorney for Plaintiffs

APPENDIX T

OFFICE OF THE MARICOPA COUNTY ATTORNEY
RICHARD M. ROMLEY
COUNTY ATTORNEY

October 5, 1999

Aaron Burns
8531 E Amethyst
Tucson, AZ

RE: State v. Caliri. Parker & Givens
CR 98-11372

Dear Mr. Burns:

I am the legal assistant working with the deputy county attorney who is prosecuting the defendant in the above entitled case. This case involves the crime of murder, which occurred July 20, 1998.

You are listed as a witness the State intends to call in this case As such, the defendants attorney has a right to interview you before trial. Because either the county attorney or I want to be present whenever you discuss the cast with the defense attorney or their representative, the interview will be held in our office. Please call me at (602) 506-7920 so that I can schedule a time for this interview.

Should you receive an interview request from the defense attorney or their representative, you may tell the person to contact me. Please remember that any person who tells you that he/she is an employee of Maricopa County may work for the Public Defender's Office or the prosecutor's office.

Very truly yours,

Phillip Quihuis
Legal Assistant
Homicide Bureau

APPENDIX U

IN SUPERIOR COURT OF THE STATE OF ARIZONA AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. AARON SCOTT BURNS, Defendant.	NO. CR 98-06715 PLEA AGREEMENT

The State of Arizona and the Defendant hereby agree to the following disposition of this case:

Plea: The Defendant agrees to plead guilty to:

Count 1: Drive by Shooting a class 2 felony in violation of A.R.S. § 13-1209, -604, -701, -702.801
committed on March 23. 1998.

THIS OFFER EXPIRES AND IS REVOKED IF NOT ENTERED IN COURT BY May 4,1999.

This is a **DANGEROUS**, non-repetitive offense under the criminal code.

Terms: On the following understandings, terms and conditions:

1. The crime carries a presumptive sentence of 10.5 years; a minimum sentence of 7 years: and a maximum sentence of 21 years. Probation is not available. Restitution of economic loss to the victim and waiver of extradition for probation revocation procedures are required. The maximum fine that can be imposed is $150,000 plus a 60% surcharge. If the Defendant is sentenced to prison the Defendant shall also be sentenced to serve a term of community supervision equal to one-seventh of the prison term to be served consecutively to the actual period of imprisonment. If the Defendant fails to abide by the conditions of community supervision, the Defendant can be required to serve the remaining term of community supervision in prison. Special conditions regarding the sentence imposed by statute (if any) are none.

2. The parties stipulate to the following additional terms, subject to court approval at the time of sentencing as set forth in paragraph 7:

   The defendant shall be sentenced to 7 years DOC. Restitution to the victim in an amount not to exceed $10, 000. (The foregoing italicized text was hand-written in the original document).

3. The following charges are dismissed or, if not yet filed, shall not be brought against the Defendant: The State shall dismiss count II

4. This agreement serves to amend the complaint or information, to charge the offense to which the Defendant pleads, without the filing of any additional pleading. However, if the plea is rejected by the court or withdrawn by either party, or if the conviction is subsequently reversed, the original charges and any charges that are dismissed by reason of this plea agreement are automatically reinstated.

5. If the Defendant is charged with a felony, he hereby waives and gives up his rights to a preliminary hearing or other probable cause determination on the charges to which he pleads. The Defendant agrees that this agreement shall not be binding on the State should the Defendant be charged with or commit a crime between the time of this agreement and the time for sentencing in this cause; nor shall this agreement be binding on the State until the State confirms all representations made by the Defendant and his attorney, to-wit: The Defendant avows no prior felony convictions.

If the Defendant fails to appear for sentencing, the court may disregard the stipulated sentence and impose any lawful sentence which is the same as or exceeds the stipulated sentence in the plea agreement. In the event the court rejects the plea, or either the State or the Defendant withdraws the plea, the Defendant hereby waives and gives up his right to a preliminary hearing or other probable cause determination on the original charges.

THE STATE OF ARIZONA,)
Plaintiff,)
)
vs.)
)
AARON SCOTT BURNS,)
Defendant.)

NO. CR 98-06715

PLEA AGREEMENT

6. Unless this plea is rejected by the court or withdrawn by either party, the Defendant hereby waives and gives up any and all motions, defenses, objections, or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement. By entering this agreement, the Defendant further waives and gives up the right to appeal.

7. The parties hereto fully and completely understand and agree that it is the court's duty to impose sentence upon the Defendant, and that any sentence either stipulated to or recommended herein in paragraph two is not binding on the court. If after accepting this plea the court concludes that any of the plea agreements provisions regarding the sentence or the term and conditions of probation are inappropriate, it can reject the plea. If the court decides to reject the plea agreement provisions regarding sentencing, it must give both the state and the Defendant an opportunity to

withdraw from the plea agreement. In case this plea agreement is withdrawn, all original charges will automatically be reinstated. The Defendant in such case waives and gives up his right to a probable cause determination onthei original charges.

8. If the court decides to reject the plea agreement provisions regarding sentencing and neither the state nor the Defendant elects to withdraw the plea agreement, then any sentence either stipulated to or recommended herein in paragraph 2 is not binding upon the court, and the court is bound only by the sentencing limits set forth in paragraph 1 and the applicable statutes.

9. This plea agreement in no way affects any forfeiture proceedings pursuant to A.R.S. § 13-4301 et seq., § 13-2314, or § 32-1993, if applicable, nor does the plea agreement in any way compromise or abrogate any civil actions, including actions pursuant to A.R.S. § 132301 et seq. or § 13-4301 et seq., or the provisions of A.R.S. § 13-2314(G) or A.R.S. § 13-431 O(C).

10. I have read and understand the provisions of pages one and two of this agreement I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading guilty I will be waiving and giving up my right to a determination of probable cause, to a trial by jury, to confront, cross-examine, compel the

attendance of witnesses, to present evidence in my behalf, my right to remain silent, my privilege against self-incrimination, presumption of innocence and right to appeal. I agree to enter my plea as indicated above on the terms and conditions set forth herein. I fully understand that if, as part of this plea agreement, I am granted probation by the court, the terms and conditions thereof are subject to modification at any time during the period of probation. I understand that if I violate any of the written conditions of my probation, my probation may be terminated and I can be sentenced to any term or terms stated above in paragraph one, without limitation.

I have personally and voluntarily placed my initials in each of the above boxes and signed the signature line below to indicate I read and approved all of the previous paragraphs in this agreement, both individually and as a total binding agreement.

Date: 5-4-99 (hand-written on original document)

Defendant : Aaron-Scott Burns

I have discussed this case with my client in detail and advised him of his constitutional rights and all possible defenses. I believe that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

Date: 5-4-99 (hand-written on original document)

Defense Counsel: Humberto Rosales

I have reviewed this matter and concur that the plea and disposition set fort herein are appropriate and are in the interests of justice.

Date: 5-4-99 (hand-written on original document)

Prosecutor: Daniel J. Larson-#017317

APPENDIX V

OFFICE OF THE MARICOPA COUNTY ATTORNEY
RICHARD M. ROMLEY
COUNTY ATTORNEY

September 14,1998

Humberto Rosales, Esq
1001 N. Central Ave., Suite 660
Phoenix, Arizona 85004

Re: State v. Aaron Scott Burns CR98-06715

Dear Mr. Rosales:

It is the understanding of the Maricopa County Attorney's Office and the defendant, Aaron Burns, that the defendant has offered willingly to cooperate with the Maricopa County Attorney's Office and the Phoenix Police Department. In that regard, the defendant wishes to tender his cooperation in the investigation of Larry Givens aka Larry Dimetrius, and Joseph Parker aka JoJo.

For the purpose of allowing the prosecution to assess the credibility and value of the evidence and possible testimony that Mr. Burns says he can provide, it is agreed the defendant will first reveal to us everything that he knows about the above-named investigation, and that he will do so completely and truthfully. It is also understood that the defendant is not entitled at this juncture to any specific consideration regarding the charges against him just because he will have given to the prosecution such a statement. Such consideration, if any at all, will be unilaterally determined by the Maricopa County Attorney's Office only after the statement is made.

Should the defendant, in good faith, be unable to truthfully provide information about the circumstances surrounding this investigation, or should the prosecution decide for whatever reason not to use him as a witness, nothing either said or revealed by him or his attorney during the attempted negotiation of an agreement (including the fruits thereof) shall be used against him in any prosecution so long as he has told the truth. However, if Mr. Burns lies or engages in deception of any sort, the promise not to use what he says against him shall be null and void. Furthermore, any untruth may be the predicate for additional criminal charges, if it appears that he has violated any other statute in making, such statements or providing such evidence.

9-16-98
Date

Vince Imbordino
Daniel Larson
Deputy County Attorney

I have read the Initial Contact Agreement and discussed it with my client. It accurately reflects our understanding of the preliminary agreement with my client.

9-16-98
Date

Humberto Rosales
Attorney for Defendant

I have read this Initial Contact Agreement in the presence of my attorney and discussed it with him. I accept the preliminary agreement and the conditions as stated in the letter.

9-16-98
Date

____
Aaron Burns
Defendant